CH. 13
CONTROLLED SUBSTANCES

§13-1
Generally

United States Supreme Court

Burgess v. United States, 553 U.S. 124, 128 S.Ct. 1572, 170 L.Ed.2d 478 (2008) The Federal Controlled Substances Act doubles the mandatory minimum sentence for certain drug offenses if the defendant has been previously convicted of a "felony drug offense." The court held that a state drug conviction constitutes a "felony drug offense" if it was punishable by a prison sentence in excess of one year, even if the offense was classified as a misdemeanor by state law.

U.S. v. Oakland Cannabis Buyer's Cooperative, 532 U.S. 483, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) The Controlled Substances Act, which prohibits the manufacture and distribution of various drugs, does not permit a "medical necessity" exception to the prohibition against distribution of marijuana. Although "it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute," Congress has determined that the only exception to the Act is for government-approved research projects.

Smith v. U.S., 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) Offering to trade a weapon for cocaine constitutes "use" of a weapon "during and in relation to" a drug crime, and triggers a mandatory 30-year sentence under federal law. Congress did not limit the mandatory sentence to situations in which a firearm is used as a weapon. Rather use of a weapon occurs "in relation to" an offense when it has some "purpose or effect" with respect to the crime.

Illinois Supreme Court

People v. McCarty, 86 Ill.2d 247, 427 N.E.2d 147 (1981) The Court upheld provisions of the Controlled Substances Act which define cocaine as a "narcotic drug." The Court rejected defendant's contention that since cocaine is not medically or pharmacologically a narcotic, it was unreasonable to include it within the definition of "narcotic drug." The legislature has defined "narcotic," and this definition need not be the same as that used by the scientific or medical community. Legislative definitions "commonly create a narrower or broader meaning of terms for the purpose of the statute than would other definitions commonly used."

People v. Bradley, 79 Ill.2d 410, 403 N.E.2d 1029 (1980) A statute which provides a greater penalty for possession than for delivery of the same controlled substances, violates due process under the Illinois Constitution. Provisions which provide the same or a lesser penalty for possession are not invalid.

Illinois Appellate Court

People v. O'Malley, 2021 IL App (5th) 190127 The trial court erred when it found defendant was entitled to statutory immunity as provided in 720 ILCS 570/414(b) of the Controlled Substances Act. Section 414(b) grants limited immunity for a person seeking medical assistance for someone experiencing an overdose. The only question before the court was

whether defendant was a person who, in good faith, was seeking and obtaining emergency medical assistance for someone experiencing a drug overdose at the time.

Immunity is an affirmative defense which defendant bears the burden of properly raising and establishing. Here, an individual called 911 from a residence seeking medical attention for the overdose victim. The caller reported that defendant, the overdose victim, and others had recently departed in a vehicle. That call resulted in defendant's vehicle being stopped by the police in an effort to check on the well-being of the overdose victim. During the stop, defendant did not say she was taking the overdose victim to the hospital. And, while she was traveling in the direction of a hospital, there was no evidence that defendant was seeking emergency medical assistance for her passenger where defendant later told the police she had no idea where she was going. Accordingly, the trial court's decision granting defendant's motion to dismiss was against the manifest weight of the evidence and was reversed.

People v. Markham, 2019 IL App (3d) 180071 Trial court properly dismissed charge of unlawful possession of a controlled substance, finding that defendant was entitled to the limited immunity granted under Section 414(c) of the Controlled Substances Act: "a person who is experiencing an overdose shall not be charged or prosecuted for Class 4 felony possession of a controlled...substance...if evidence for the Class 4 felony possession charge was acquired as a result of the person seeking or obtaining emergency medical assistance...."

Here, a female companion called 911 to seek medical assistance for defendant who was suffering an overdose. Law enforcement officers and paramedics arrived, treated defendant with multiple doses of Narcan, and rendered additional medical assistance. While he was being prepped for transport to the hospital via ambulance, defendant requested his wallet and keys. An officer retrieved those items and discovered a small amount of heroin in defendant's wallet, leading to the charges.

The Appellate Court rejected the State's argument that the heroin was not recovered "as a result" of defendant's obtaining emergency medical assistance. The limited immunity statute "provides broad and unconditional protection from the prying eyes of law enforcement present at the scene of an overdose." While defendant had regained consciousness and was able to request his wallet and keys, law enforcement's discovery of the heroin was still a result of their entering the residence to provide emergency medical assistance. Accordingly, defendant was immune from prosecution by virtue of the limited immunity statute.

People v. Garcia, 2018 IL App (4th) 170339 Defendant, who pled guilty to three drug offenses in exchange for the dismissal of seven others, challenged his sentence by arguing that the court improperly considered the quantity of drugs in determining his sentence because quantity was already an element of the offenses. Double enhancements are prohibited except where the legislature clearly intends otherwise. The Appellate Court determined that the legislature intended to permit double enhancement where the Cannabis Control Act and Controlled Substances Act expressly provide "wide latitude" in sentencing discretion, and the Controlled Substances Act further provides that the large quantity of drugs is a factor in determining which violations are the most damaging and warrant the most severe penalties. Here, the trial court referenced the large quantity of drugs in discussing the severity of defendant's offenses. The trial court properly considered the fact that defendant was in possession of 1500 grams of cocaine and 2 pounds of marijuana when imposing sentence for defendant's drug offenses.

People v. Haiman, 2018 IL App (2d) 151242 A defendant has the right to the meaningful opportunity to present a defense, but evidence of a purported defense can be excluded if its probative value is outweighed by its prejudicial impact, if the evidence would lead to confusion of the issues, or if the evidence has the potential to mislead the jury. Where defendant was charged with unlawful possession of a controlled substance, the court did not abuse its discretion in prohibiting defendant from testifying that she had a prescription for the pills in question. Defendant disclosed the proposed defense to the State but did not provide a copy of a prescription and said she would not name the prescribing doctor or date of prescription.

It is defendant's burden, pursuant to 720 ILCS 570/506, to establish her right to possession of the substance pursuant to a lawful prescription under 720 ILCS 570/302(c)(3). Defendant's proposed self-serving testimony would have verged on a conclusion of ultimate fact and would have rendered the burden of proof meaningless. Her testimony also would have been legally insufficient because the pills were not in their original container and the statutory defense requires proof that the prescription was issued by a "practitioner" which could not be established on defendant's non-specific testimony.

People v. Monteleone, 2018 IL App (2d) 170150 Defendant owned a smoke shop where he sold commercially-packaged products labeled "Mary Joy" and "Mary Joy Dead and Berried" to an undercover officer. Those products tested positive for illegal synthetic cannabinoids, although the ingredients listed on the package did not include any illegal substance. Defendant argued that the State did not prove beyond a reasonable doubt that he had the requisite knowledge to support convictions of unlawful delivery of a controlled substance and unlawful possession of controlled substance with intent to deliver. The Appellate Court concluded that there was sufficient circumstantial evidence of defendant's knowledge, including that the products were not on public display, he sold them out of a back office rather than in the retail space of his shop, he did not ring up the sales through the cash register and did not provide a receipt, and he made statements indicating that he knew the effects of the products were like those of controlled substances.

People v. Teper, 2016 IL App (2d) 160063 720 ILCS 570/414(c) provides that a person "who is experiencing an overdose shall not be charged or prosecuted for . . . possession of [specified amounts of] a controlled . . . substance . . . if evidence for the . . . charge was acquired as a result of the person seeking or obtaining emergency medical assistance." However, 720 ILCS 570/414(e) provides that such limited immunity shall not be afforded where law enforcement "has reasonable suspicion or probable cause to detain, arrest, or search the person . . . for criminal activity and the reasonable suspicion or probable cause is based on information obtained prior to or independent of the individual . . . taking action to seek or obtain emergency medical assistance and not obtained as a direct result of the action of seeking or obtaining emergency medical assistance."

Here, police found defendant unconscious after a citizen call reported a driver slumped over the steering wheel of her car. Police suspected a drug overdose and administered Narcan. Thus, defendant qualified as a person who was "obtaining" emergency medical treatment under §414(c). The court rejected the State's argument that to "obtain" emergency medical assistance, a person must take some affirmative action.

However, under §414(c), immunity applies only if the evidence was procured by the person obtaining emergency medical assistance. Here, the officers observed two baggies of a brown rock-like substance which they believed to be heroin and several hypodermic syringes in the bottom of a can which contained cotton. The officers did not discover the evidence as

the result of defendant obtaining help. Instead, it was the presence of the suspected drugs and paraphernalia which led officers to believe that defendant was suffering an overdose. Under these circumstances, the limited immunity authorized by §414(c) did not apply to the charge of unlawful possession of a controlled substance.

In the alternative, §414(e) would have barred immunity because the officers saw the illegal drugs in plain view while they were investigating a car that was stopped in traffic. At that point, they had probable cause to seize the contraband and arrest the occupants of the car. Because the officers had probable cause independent of the emergency medical assistance rendered to defendant, limited immunity did not apply.

People v. Presa, 2014 IL App (3rd) 130255 720 ILCS 635/1 creates the offense of unlawful possession of hypodermic syringes or needles. 720 ILCS 635/1(a) provides that other than as provided in §635/1(b), a person who is not "engaged in chemical, clinical, pharmaceutical or other scientific research" may not possess hypodermic needles. §635/1(b) provides that a person who is at least 18 may possess up to 20 hypodermic needles which he or she has purchased from a pharmacy.

Defendant was a participant in the Chicago Recovery Alliance, which was a non-profit group which allowed persons who were accepted in the program and who had coded program cards to obtain as many clean needles as they wanted, without any requirement that they exchange dirty needles. The purpose of the program was to fight the spread of HIV and Hepatitis B and C. Participants were asked a series of questions that were compiled for research purposes.

The State conceded that CRA was an entity that was engaged in "chemical, clinical, pharmaceutical or other scientific research." Furthermore, the court found that by definition the term "clinical . . . scientific research" includes not only researchers but also persons or patients who participate in research studies. Because defendant was a current participant in the program, he was engaged in "clinical scientific research" for purposes of §635/1(b). Therefore, the conviction was reversed.

People v. Barash, 325 Ill.App.3d 741, 759 N.E.2d 590 (3d Dist. 2001) 720 ILCS 550/13(b), under which "[a] conviction or acquittal, under the laws of the United States or of any State relating to Cannabis for the same act is a bar to prosecution in this State," precluded prosecution of Illinois charges of cannabis trafficking and unlawful possession of cannabis with intent to deliver after defendant pled guilty to an Arizona offense based on the same conduct.

People v. Brown & Cooper, 277 Ill.App.3d 989, 661 N.E.2d 533 (1st Dist. 1996) The offense of criminal fortification requires proof that, with intent to prevent the lawful entry of the police, the defendant maintained a residence in a fortified condition with knowledge that the building will be used for manufacture, storage or delivery of controlled substances (720 ILCS 5/19-5(a)). In the absence of any evidence that defendant had ever been to the apartment before the date in question or was responsible for fortifying it, his conviction could not stand.

People v. Pehrson, 190 Ill.App.3d 928, 547 N.E.2d 613 (2d Dist. 1989) The Court upheld Ch. 56½, ¶1401(b)(2), which makes delivery of 1 to 15 grams of cocaine a Class 1 felony, over the contention that the statute violates due process because delivery of the same amount of heroin (up to 10 grams) is a Class 2 felony.

People v. American Daily Publishing, 134 Ill.App.3d 1028, 481 N.E.2d 859 (5th Dist. 1985) A newspaper owned and published by the defendant ran an ad for diet pills. The ad was placed by a third party identified as D.M., and listed a Missouri post office box and phone number for placing orders. The trial court dismissed an information charging defendant with a violation of Ch. 56½, ¶1404(b), which makes it "unlawful for any person knowingly to . . . advertise . . . a look-alike substance.") The Appellate Court held that the owner and publisher of a newspaper which publishes an advertisement for diet pills is not an "advertiser" within the meaning of ¶1404(b). The Court held that to "advertise" within the meaning of ¶1404(b), one must attempt "to induce others to acquire a look alike substance." Here, defendant merely sold space in a newspaper for the ad; it did not attempt to induce any person to acquire a look-alike substance.

§13-2
Charging the Offense

Illinois Supreme Court

People v. Robinson, 167 Ill.2d 397, 657 N.E.2d 1020 (1995) The weight of a controlled substance is an essential element of possession where the defendant could have been charged with a lesser included offense based on possession of a smaller amount of the drug. Here, the "lesser included offense" exception did not apply because defendant was charged with possessing the statutory minimum quantity of the controlled substance. See also, **People v. Nixon**, 278 Ill.App.3d 453, 663 N.E.2d 66 (3d Dist. 1996) (where a defendant could have been charged with a lesser offense for possession of a smaller amount of the substance, the weight of the drug is an essential element of the crime and must be proven beyond a reasonable doubt.

People v. Lewis, 83 Ill.2d 296, 415 N.E.2d 319 (1980) The defendant was charged with delivery of cannabis, and was found guilty of possession of cannabis with the intent to deliver. Defendant alleged that it was error to convict him of possession with intent to deliver since he was not charged with that offense. The Court held that the defendant was properly convicted of possession of cannabis with the intent to deliver based upon the information charging delivery; possession with intent to deliver is a lesser included offense of delivery.

Illinois Appellate Court

People v. Zarbock, 2022 IL App (2d) 210238 The trial court acquitted defendant of drug-induced homicide but convicted him of the uncharged, lesser-included offense of possession of a controlled substance. Defendant challenged his conviction on appeal, arguing that PCS is not a lesser-included offense of drug-induced homicide.

Defendant did not forfeit the issue despite failing to challenge the finding in a post-trial motion. Whether an uncharged offense is a lesser-included offense of a charged offense presents a constitutional issue of due process. Defendant's objection in his written closing argument satisfied the exception that constitutional issues that were raised at trial and could be raised in a post-conviction petition may be advanced on direct appeal without first being presented in a post-trial motion.

When the issue is whether an uncharged offense is a lesser-included offense of a charged offense, courts employ the charging-instrument approach. Under the charging-instrument approach, a court looks to the charging instrument to see whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense.

Here, the charging instrument, an indictment alleging defendant, or one for whom he was accountable, committed drug-induced homicide by delivering heroin to another, and that the victim died after ingesting this heroin. The indictment did not provide factual details, such as where the drugs were delivered, who delivered them, and whether the victim who ingested them actually received delivery of it. Therefore, the indictment did not outline the lesser-included offense, and defendant did not receive sufficient notice that he may be held accountable for the victim's possession of the controlled substance. The appellate court vacated defendant's conviction.

People v. Fiumetto, 2018 IL App (2d) 170230 When determining whether a requirement of a criminal statute is a description of the offense which must be included in the charging instrument, or merely an exception, courts look to whether the language describes the crime or whether it describes persons. If the language designates certain persons not covered by the statute, it is an exception. Here, Section 1(a) of the Syringes Act begins with the phrase "[e]xcept as provided in subsection (b)." 720 ILCS 635/1(a) (2016). In turn, section 1(b) states that any person who is at least 18 years old may possess up to 20 syringes if she has purchased them from a pharmacy. Because this language describes persons, it qualifies as an exception rather than a description of the offense, and need not be alleged in the charging instrument.

An ordinary spoon (as opposed to a miniature cocaine spoon under 720 ILCS 600/2(d)(5)(D)(2016)), does not qualify as "drug paraphernalia," even when found near a syringe, because section 4(b) of the Paraphernalia Act exempts any item used to ingest "any other lawful substance." 720 ILCS 600/4(b) (2016).

People v. Jones, 288 Ill.App.3d 293, 681 N.E.2d 537 (1st Dist. 1997) An essential element of an offense under 720 ILCS 570/407(b)(2), which enhances certain narcotic crimes if they occur "on the real property comprising any school . . . public housing or public park or on the public way within 1,000 feet of the real property comprising any school . . . public housing . . . or public park," is that the crime occurred "on a public way" and not merely within 1,000 feet of the subject property. Where defendant was charged only with having committed drug offenses "within 1,000 feet of the real property" managed by a public housing authority, and not on "a public way" within 1,000 feet of such property, the information was subject to dismissal. See also, **People v. Carter**, 297 Ill. App.3d 1028, 697 N. E.2d 895 (1st Dist. 1998).

People v. Urban, 196 Ill.App.3d 310, 553 N.E.2d 740 (3d Dist. 1990) A defendant may not be charged with conspiracy to deliver cannabis based upon his act of purchasing cannabis.

People v. Johnson, 174 Ill.App.3d 726, 528 N.E.2d 1356 (4th Dist. 1988) Proof of a defendant's prior conviction is an essential element of the offense of unlawful possession of a hypodermic syringe or needle (Ch. 38, §§22-50, 22-53). The first offense for such unlawful possession is a Class A misdemeanor, while subsequent offenses are Class 4 felonies. Thus, to convict a defendant of a felony based upon a subsequent offense, the prior conviction must be proved at trial.

People v. Lev, 166 Ill.App.3d 173, 519 N.E.2d 1168 (2d Dist. 1988) The Court held that "attempt possession of a controlled substance with the intent to deliver" is a criminal offense.

People v. Betts, 78 Ill.App.3d 200, 397 N.E.2d 106 (1st Dist. 1979) Defendant was charged by indictment with unlawful delivery of a controlled substance, Dexedrine, "which is a

narcotic . . . in violation" of Ch. 56½, ¶1401(b). Over objection, the State was allowed to amend the indictment to read "which is not a narcotic . . . in violation of . . . section 1401(c)." The Appellate Court held that the amendment was substantive and thus improper. The amendment was not merely technical, since it changed the very offense charged.

People v. Troutt, 51 Ill.App.3d 656, 366 N.E.2d 370 (5th Dist. 1977) The defendant was originally charged by information, signed and sworn to be the State's Attorney, for the unlawful possession of "30 grams of a controlled substance, amphetamine." Over objection, the State's Attorney was allowed to amend the information to charge the unlawful possession of "300 grams of phencyclidine." After the change, the information was not reverified. The Appellate Court held that because the effect of the amendment was to change the nature and elements of the offense charged, it was a material change. Therefore, the information was required to be reverified, and the trial court erred by denying defendant's motion in arrest of judgment.

People v. Clutts, 43 Ill.App.3d 366, 356 N.E.2d 1367 (5th Dist. 1976) An indictment alleging that defendant sold 50,000 amphetamine tablets was not sufficient to charge unlawful delivery of 200 grams under Ch. 56½, ¶1401(a)(6). The gram amount is an essential element that must be alleged in the indictment.

People v. Lucas, 33 Ill.App.3d 309, 337 N.E.2d 103 (3d Dist. 1975) The defendant's conviction for calculated criminal drug conspiracy (Ch. 56½, ¶1405) is reversed. Although there was evidence that defendant was accountable for the delivery and that there was an "ordinary conspiracy," a calculated criminal drug conspiracy requires a defendant to either organize or direct a conspiracy to deliver a controlled substance. The proof must show the defendant either "had sufficient influence over his co-conspirators to be in a position to systematize their activities or to give orders or instructions that would to some extent be binding."

§13-3
Proving the Offense

§13-3(a)
Nature of the Substance

§13-3(a)(1)
Generally

Illinois Supreme Court

People v. Hagberg, 192 Ill.2d 29, 733 N.E.2d 1271 (2000) A field test, standing alone, can establish the nature of a suspected controlled substance beyond a reasonable doubt. However, the field test in this case was insufficient to prove that the substance in question was cocaine; the officer who performed the test could not remember the name of the test, the instructions for performing it, the color which indicated that the substance was cocaine, or the color that the substance turned. The court concluded that such testimony was too "vague and speculative" to identify the substance.

People v. Newberry, 166 Ill.2d 310, 652 N.E.2d 288 (1995) After a field test showed that a substance seized from the defendant was not a controlled substance, defendant was charged with unlawful possession of a "look-alike" substance with intent to distribute. When the substance was later tested in a laboratory and determined to be cocaine the State dismissed the "look-alike" charge and replaced it with counts relating to unlawful possession of a controlled substance. An evidence technician saw that the original charges had been dismissed and destroyed the substance in the mistaken belief that all charges had been terminated. Defense counsel had filed a written discovery motion, including a request to examine the substance, before the technician destroyed the substance. The trial court granted defendant's motion to dismiss the charges, holding that due process is violated where the State destroys an alleged controlled substance after the defense files a request for preservation. Where the destroyed evidence is "essential to and determinative of the outcome of the case," due process is violated. To hold otherwise would be unfair because the defendant "cannot be convicted . . . absent proof of the content of the disputed substance," and he has no "realistic hope of exonerating himself absent the opportunity to have it examined by his own experts." Furthermore, where the defense specifically places the State on notice to preserve evidence, and the State nonetheless destroys the substance (even inadvertently), the defense need not "make an independent showing that the evidence had exculpatory value in order to establish a due process violation."

People v. Park, 72 Ill.2d 203, 380 N.E.2d 795 (1978) Conviction for possession of cannabis reversed since the only evidence that the substance was cannabis came from the testimony of a deputy sheriff, who had a complete lack of training in the subject and whose experience as a deputy did not qualify him to reliably identify the substance.

Illinois Appellate Court

People v. Chatha, 2015 IL App (4th) 130652 Defendant, a convenience store owner, was convicted of possession of a controlled substance with intent to deliver after his store clerk sold a commercially packaged product which contained AM-2201 (synthetic cannabis). Defendant testified that when Illinois law changed to prohibit the sale of certain products, he took those products out of his stores. He was then asked by customers why he did not stock Bulldog Potpourri, which the customers said was being sold by a tobacco store in Bloomington.

After talking to an employee of the tobacco store and a supplier who claimed that the potpourri did not contain any synthetic drug, defendant began to sell the product in his stores. The packaging for the potpourri stated that it "did not contain any illegal substances" and "was not for human consumption."

Defendant was charged after an informant purchased the product, which was kept beneath the counter. Defendant testified that he kept the product beneath the counter so that the cashier, who was the only employee in the store, would not have to walk back and forth from the glass display case every time a sale was made.

The Appellate Court found that the evidence was insufficient to establish guilt beyond a reasonable doubt.

To convict of possession of a controlled substance with intent to deliver, the State must prove that the defendant had knowledge of the presence of the substance, had possession or control of the substance, and intended to deliver the substance. There was no question that defendant sold the product, and the only issue was whether he knew that the potpourri contained a controlled substance. The court noted that the statute defining the offense (720

ILCS 570/401(c)(11)) described the controlled substance by its molecular composition, and stated that "we doubt that anyone without an advanced degree in chemistry could articulate intelligently the differences" between the controlled substances identified in the statute, "much less identify with certainty the specific controlled substances if they were shown in their raw form."

The court also noted that the lab-manufactured controlled substances "can likely be applied to any legal product" and that their presence can only be detected by scientific testing. Finally, the court concluded that the State will rarely be able to prove that a defendant knowingly possessed a prohibited chemical substance that is defined by its molecular composition, and at most can hope to prove the knowing possession of something that could be ingested for its intoxicating effects.

The court stressed that unlike a street corner transaction where a substance is not professionally packaged, it is difficult for a store owner to know whether a commercially packaged material contains a non-organic controlled substance defined by its molecular composition. The court rejected the argument that because defendant knew some of his customers smoked the potpourri, he should have known it contained a controlled substance. The fact that customers might misuse the product did not indicate that defendant knew it contained a banned substance.

The court also noted that defendant willingly complied with laws and ordinances and demonstrated concern about the legality of the products offered in his store, and began to sell Bulldog Potpourri only after conducting an investigation which seemed to indicate that it did not contain a controlled substance. Because the evidence was insufficient to establish beyond a reasonable doubt that the defendant knew the potpourri contained a controlled substance, the conviction and the sentence were reversed.

People v. Glisson, 359 Ill.App.3d 962, 835 N.E.2d 162 (5th Dist. 2005) As an issue of first impression, the Appellate Court held that testimony by police officers who are familiar with the odor of anhydrous ammonia is sufficient to identify a substance as anhydrous ammonia. The court noted testimony that forensic labs will not accept anhydrous ammonia for testing because it is a hazardous substance, and that the officers stated they were familiar with the odor of anhydrous ammonia through their experience as law enforcement officers.

People v. Raney, 324 Ill.App.3d 703, 756 N.E.2d 338 (1st Dist. 2001) To admit an expert opinion based on testing by an electronic or mechanical device, the proponent must show that: (1) the facts in question are a type reasonably relied upon by experts in the field, and (2) the electronic or mechanical device was functioning properly at the time of the testing. Where an expert utilized gas chromatography mass spectrometer test results to determine that a substance was cocaine, but did not testify that the machine was functioning properly at the time of the testing, the State failed to establish a sufficient foundation to render the opinion admissible.

People v. Hall, 306 Ill.App.3d 848, 715 N.E.2d 300 (3d Dist. 1999) Where a defendant is charged with possession of a specific amount of a controlled substance with intent to deliver, and there is a lesser-included offense of possession of a smaller amount of the substance, the weight of the seized drug is an essential element of the crime and must be proven beyond a reasonable doubt. Although the State need not prove that all of the seized substance was tested, the amount that was tested must establish the minimum quantity needed to prove the charge. Random testing is permitted only when the samples are "sufficiently homogeneous so that one may infer beyond a reasonable doubt that the untested samples

contain the same substance as those that are conclusively tested." Where the substance is not "sufficiently homogeneous," a portion from each container or sample must be tested.

People v. Jones, 260 Ill.App.3d 807, 633 N.E.2d 218 (4th Dist. 1994) Where the contents of several containers are combined *before* definitive testing is conducted, so that random samples of *each* container are subject to the testing, the weights of all the containers can be aggregated to determine the amount of substance possessed. See, however **People v. Jackson**, 134 Ill.App.3d 785, 481 N.E.2d 1222 (3d Dist. 1985), where the Court held that where samples of only *some* containers are subjected to definitive testing, the untested containers cannot be assumed to contain the same substance.

People v. Maiden, 210 Ill.App.3d 390, 569 N.E.2d 120 (1st Dist. 1991) Defendant was convicted of unlawful possession of more than 30 grams of a controlled substance (PCP) with intent to deliver. The Court found that the evidence was insufficient to establish that three liquor bottles seized from the defendant's house contained PCP. A chemist testified that all three bottles tested positive in a preliminary test for PCP, but that conclusive testing was performed on only one bottle. Because the State only proved possession of the PCP in one bottle, the conviction was reduced to possession of less than 30 grams of a controlled substance with intent to deliver.

People v. Vazquez, 180 Ill.App.3d 270, 535 N.E.2d 981 (1st Dist. 1989) "A field test of a substance has been held sufficient to prove the substance is a narcotic."

People v. Kaludis, 146 Ill.App.3d 888, 497 N.E.2d 360 (1st Dist. 1986) A chemist is qualified to render an opinion concerning the entire substance based upon the testing of random samples. There was sufficient evidence for the jury to find that all of the tablets delivered by defendant contained the controlled substance based upon the test results of three randomly selected tablets which exhibited similar characteristics to the other tablets. See also, **People v. Saldana**, 146 Ill.App.3d 328, 496 N.E.2d 757 (2d Dist. 1986) (LSD).

People v. Ayala, 96 Ill.App.3d 880, 422 N.E.2d 127 (1st Dist. 1981) Defendant was convicted of possession of more than 30 grams of a controlled substance for possessing two bags of alleged heroin. The Court held that the evidence was insufficient to prove that both bags contained heroin, since only one of the bags was subjected to a spectrophotometer test (a conclusive test for heroin). Though both bags were subjected to chemical color tests, those tests only showed that heroin "might be present."

§13-3(a)(2)
Chain of Custody

Illinois Supreme Court

People v. Alsup, 241 Ill.2d 266, 948 N.E.2d 24 (2011) Before the State can introduce results of chemical testing of a purported controlled substance, it must provide a foundation for its admission by showing the police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist. Once the State establishes this *prima facie* case, the burden shifts to the defense to show actual evidence of tampering, alteration, or substitution. The State need not produce every person in the chain of custody to testify, nor must the State exclude every

possibility of tampering or contamination. Deficiencies in the chain of custody go to the weight, not the admissibility, of the evidence.

Because the chain of custody establishes the foundation for the admission of the testing as relevant and admissible, a challenge to the chain of custody is not a challenge to the sufficiency of the evidence, and is not exempt from forfeiture. When a challenge to the chain of custody is not preserved for review, it may be considered only under the plain-error doctrine. The plain-error doctrine applies only if there is a complete breakdown in the chain of custody, amounting to a complete failure of proof, where there is no link between the substance tested and the substance recovered by the police. **People v. Woods**, 214 Ill.2d 455, 828 N.E.2d 247 (2005), did not create a *per se* rule that plain error occurs where there is a mismatch between the inventory numbers of descriptions of the items recovered and items received. **Woods** merely hypothesized that such mismatches could be reviewable as plain error where there is a dearth of other evidence of the chain of custody.

The State met its burden of a *prima facie* case that the items recovered and tested were the same, and the defense did not satisfy its burden of rebutting this case with evidence of actual tampering, alteration and substitution. A police officer testified that he recovered five tinfoil packets of suspected heroin and ten baggies of suspected cocaine and used reasonable protective measures to ensure the safekeeping of the evidence from the time that he seized it until it was placed in an evidence vault in a heat-sealed package. The parties stipulated that the forensic chemist received a heat-sealed package with the same inventory number as testified to by the officer, and that the chemist would testify to the maintenance of a proper chain of custody "at all times." Even though the stipulation also specified that the chemist received and tested nine items of suspected heroin, this discrepancy only went to the weight, not the admissibility, of the evidence as there was no complete breakdown in the chain of custody.

Also with regard to the five-versus-nine discrepancy, the court concluded that any issue as to the chain of custody was entirely removed from consideration by the stipulation because the defense action in agreeing to the stipulation deprived the State of the opportunity to correct or explain the discrepancy.

People v. Woods, 214 Ill.2d 455, 828 N.E.2d 247 (2005) When the State seeks to introduce an object into evidence, it must lay an adequate foundation by either identifying the object or establishing a chain of custody. Where physical evidence is not readily identifiable or may be susceptible to tampering, the prosecution must show a chain of custody that is sufficiently complete to make it improbable that the evidence has been subjected to tampering or substitution.

To establish a *prima facie* showing concerning the chain of custody for controlled substances, the State must present evidence that reasonable measures were taken to protect the evidence. Once the State establishes a *prima facie* case, the burden shifts to the defendant to produce evidence of actual tampering or substitution. If such evidence is produced, the burden shifts to the State to rebut the claim. The defendant need not introduce evidence of actual tampering or substitution unless the State has established a *prima facie* case.

A defendant may waive the necessity of proving chain of custody by agreeing to a stipulation with respect to the evidence. The primary rule for interpreting stipulations is to ascertain and give effect to the intent of the parties. Generally, a defendant is precluded from attacking or contradicting facts to which he or she stipulated.

In addition, the defendant waives a challenge to the chain of custody where he fails to object at trial and raise the issue in a post-trial motion. Although the defendant is not

required to raise a trial-level challenge to the sufficiency of the evidence, the court concluded that objections to the chain of custody involve the foundation for the admission of evidence, not the sufficiency of the evidence.

The plain error rule may apply where there is a complete breakdown in the chain of custody, including where the inventory numbers or descriptions of the recovered and tested items do not match. The plain error rule did not apply where: (1) the arresting officer testified that: (a) he recovered three zip-lock packets containing tin foil packets, (b) the packets were inventoried under a specified inventory number, and (c) "standard Chicago Police Department procedures" were followed with regard to inventorying the items, and (2) the parties stipulated that a forensic chemist: (a) received evidence under the same inventory number, (b) found the same number of packets in a sealed condition, and (c) performed tests which were positive for the presence of heroin.

In addition, defendant affirmatively waived any challenge by agreeing to a stipulation intended to eliminate any dispute with respect to the chain of custody. The court found that the State would not have agreed to stipulate to the forensic chemist's testimony, and thereby forfeit that testimony, unless the stipulation was intended to remove possible chain of custody issues. The court also noted that at trial defense counsel concentrated on whether the State had proven that defendant possessed the controlled substance, and did not claim that the evidence had been compromised.

Illinois Appellate Court

People v. Jones, 2021 IL App (3d) 190131 A *prima facie* showing of chain of custody is a foundational requirement for introduction of narcotics evidence at trial on a controlled substance charge. In order to demonstrate a sufficient chain of custody, the State must show that reasonable measures were taken to ensure the integrity of the evidence since the time it was seized. A defendant can rebut a *prima facie* showing with evidence of actual tampering, substitution, or alteration.

Where a defendant objects to chain of custody at trial, the court's decision to admit the evidence over objection is reviewed for an abuse of discretion. But, where no trial objection is made, the question is whether a clear, obvious, or plain error occurred. Such an error occurs where the State fails to establish a link between the substance recovered and the substance tested by the chemist.

Here, the arresting officer testified that he purchased two small bags of purported heroin from defendant, placed the bags into a larger evidence bag immediately thereafter, and sealed and signed his name to that bag. The lab analyst testified to receiving the bag in sealed condition, and that it contained two individual bags when it was opened. Both the officer and the analyst identified the evidence bag at defendant's trial. While more than a month passed between the time the evidence was collected and when it was tested, and while the evidence bag was marked only with the officer's signature but not a unique identifying number, there was a sufficient chain of custody based on the signature and the similar description of the bag and its contents by both the officer and the lab analyst. Thus, there was no plain error in admitting the substance into evidence.

People v. Scott, 2019 IL App (1st) 163022 Defendant forfeited his chain of custody argument in a controlled substance case. At trial, defendant moved to bar the admission of the drug evidence because the recovering officer testified that the heroin weighed 0.6 grams while the forensic chemist testified that it weighed 1.09 grams. The defendant did not, however, allege an insufficient chain of custody at trial, and therefore forfeited that argument

on appeal. Regardless, the Appellate Court found that the officer and chemist testified to the storage and inventorying of the evidence in sufficient detail to satisfy the State's burden of showing a chain of custody, disavowing **People v. Howard**, 387 Ill. App. 3d 997 (2d Dist. 2009).

People v. Howard, 387 Ill.App.3d 997, 902 N.E.2d 720 (2d Dist. 2009) To introduce evidence of the results of chemical testing of a purported controlled substance, the State must provide a foundation by showing that the police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist. In addition, before admitting the physical evidence and the test results, the trial court must determine whether the State has established a chain of custody that is sufficiently complete to make it improbable that the evidence was subject to tampering or accidental substitution.

Illinois decisions support the use of a unique identifier, such as a police inventory number, as a method of showing that the same evidence was seized and tested. The court concluded that the foundation was insufficient where no such inventory number was used, but the officers who processed the substance after the arrest testified that they marked the evidence bag with their initials, badge numbers, the date, and other unspecified information. The court noted that "[c]areful reading of the testimony suggests that the case for" an adequate foundation was "stronger than the State's arguments on appeal would indicate." However, for the Court to determine whether the record contained a foundation other than as asserted by the State "would require us to engage in outright advocacy for the State's position."

People v. Whirl, 351 Ill.App.3d 464, 814 N.E.2d 872 (2d Dist. 2004) The State failed to provide a sufficient chain of custody to sustain a conviction for possession of a controlled substance where the evidence showed that defendant spit out one packet during a search of his mouth, but the officer testified that he recovered two "packs." In addition, the recovering officer gave the items to unidentified officers from another police department, and the stipulation concerning the crime lab analyst did not indicate when the analyst received the baggies or the name of the officer who delivered them. Despite the presence of photographs showing the baggies as they appeared on the night they were recovered, the court concluded that the chain of custody was "missing too many links" concerning the location in which the second baggie was found, the length of time the second baggie was unaccounted for, the identity of person who handled the evidence between the time it was turned over to the transport officers and the time it was delivered to the crime lab, and the date on which the crime lab received the evidence.

People v. Lundy, 334 Ill.App.3d 819, 779 N.E.2d 404 (1st Dist. 2002) Evidence of a proper chain of custody is required where physical evidence is not readily identifiable or is susceptible to tampering. The chain of custody is adequate where it shows an improbability that evidence has been changed or tampered with. In the absence of evidence that evidence has been compromised, the State need not exclude every possibility of tampering. Instead, it need show only that it took reasonable steps to protect the evidence and that it is unlikely the evidence has been altered.

Where the State establishes a probability that the evidence was not compromised, any deficiency in the chain of custody goes to weight rather than admissibility, unless the defendant shows actual evidence of tampering or substitution.

The State failed to establish a sufficient chain of custody for suspected controlled

substances where it showed only that the substances seized by the arresting officer were filed under the same inventory number as substances delivered to the crime lab. Without more detailed descriptions of the exact number of bags or the nature of the shiny object, the inventory number was the only link between the substance seized from the defendant and that tested by the lab. The court also noted several inconsistencies between the officer's description of the evidence he seized and the items tested by the lab, and the failure of the stipulation to describe the "packages" at all. See also, **People v. Moore**, 335 Ill.App.3d 616, 781 N.E.2d 493 (1st Dist. 2002) (stipulation insufficient to show chain of custody where it omitted any reference to chain of custody, and immediately thereafter moved for a directed verdict because the chain of custody was inadequate; the State presented no evidence of the procedures employed to protect the evidence, and failed to show that the inventory number of the substance tested by the lab was the same as the number under which the evidence was inventoried; chain of custody issues may be treated either as trial error or as a failure to prove the defendant's guilt beyond a reasonable doubt); **People v. Howard**, 387 Ill.App.3d 997, 902 N.E.2d 720 (2d Dist. 2009) (Illinois law allows the use of unique identifiers, such as police inventory numbers, to show that the same evidence was seized and tested; the foundation was insufficient where inventory number were not used but officers who processed the substance after the arrest testified that they marked the evidence bag with their initials, badge numbers, the date, and other unspecified information).

Defendant did not waive the argument by failing to argue that the narcotics recovered by the arresting officer were contaminated, tampered with or substituted. Because the State failed to sustain its burden of proof concerning the chain of custody, defendant's burden to show actual evidence of tampering or substitution was never triggered.

People v. Moore, 335 Ill.App.3d 616, 781 N.E.2d 493 (1st Dist. 2002) The Appellate Court found that the State failed to establish a sufficient chain of custody to establish that defendant had violated his probation by committing the offense of delivery of a controlled substance.

People v. Gibson, 287 Ill.App.3d 878, 679 N.E.2d 419 (1st Dist. 1997) Where evidence is not readily identifiable or is susceptible to alteration, the State must show "a chain of custody of sufficient completeness to render it improbable that the [evidence] has been tampered with, exchanged or contaminated." Where the testimony of a veteran narcotics officer showed that all of the substance recovered weighed approximately 2 grams, the stipulation offered at trial was that the same evidence weighed 9.3 grams, and there was no evidence showing the evidence's handling and safekeeping, the State failed to demonstrate a reasonable probability that the evidence had not been altered or substituted.

People v. Terry, 211 Ill.App.3d 968, 570 N.E.2d 786 (1st Dist. 1991) At a bench trial for possession of a controlled substance, it was error to introduce alleged cocaine where disparities in the number and weight of the bags seized and the color of the powder suggested that the police had commingled evidence from unrelated arrests.

People v. Slaughter, 149 Ill.App.3d 183, 500 N.E.2d 662 (1st Dist. 1986) There was not a sufficient chain of custody for cannabis allegedly possessed by defendant. Two hand-rolled cigarettes were removed from defendant's wallet and placed in an envelope that was in turn placed in a safe. Two days later a person who identified himself as an employee of the work release center gave an envelope containing two hand-rolled cigarettes to the presiding judge, who in turn gave them to the prosecutor. Neither the judge nor the prosecutor were

acquainted with or knew the name of the above person, the guard who removed the cigarettes from defendant's wallet did not identify the envelope or mark and seal it, and the record was inconclusive with respect to whether access to the safe was restricted.

§13-3(a)(3)
Look-alike Substances

Illinois Supreme Court

People v. Newberry, 166 Ill.2d 310, 652 N.E.2d 288 (1995) After a field test showed that a substance seized from the defendant was not a controlled substance, defendant was charged with unlawful possession of a "look-alike" substance with intent to distribute. When the substance was later tested in a laboratory and determined to be cocaine the State dismissed the "look-alike" charge and replaced it with counts relating to unlawful possession of a controlled substance. An evidence technician saw that the original charges had been dismissed and destroyed the substance in the mistaken belief that all charges had been terminated. Defense counsel had filed a written discovery motion, including a request to examine the substance, before the technician destroyed the substance. The trial court granted defendant's motion to dismiss the charges, holding that due process is violated where the State destroys an alleged controlled substance after the defense files a request for preservation.

Where the destroyed evidence is "essential to and determinative of the outcome of the case," due process is violated. To hold otherwise would be unfair because the defendant "cannot be convicted . . . absent proof of the content of the disputed substance," and he has no "realistic hope of exonerating himself absent the opportunity to have it examined by his own experts." Furthermore, where the defense specifically places the State on notice to preserve evidence, and the State nonetheless destroys the substance (even inadvertently), the defense need not "make an independent showing that the evidence had exculpatory value in order to establish a due process violation."

People v. Upton, 114 Ill.2d 362, 500 N.E.2d 943 (1986) The Supreme Court upheld the penalty provisions of Ch. 56½, ¶1404 (distribution of a "look-alike," or fraudulent, controlled substance). In this statute, the legislature promulgated a preamble which attempted to justify and explain the disparity in punishment between the distribution of "look-alike" substances and the distribution of actual Schedule III, IV and V controlled substances.

Illinois Appellate Court

People v. Mocaby, 378 Ill.App.3d 1095, 882 N.E.2d 1162 (5th Dist. 2007) The Appellate Court reversed defendant's conviction for unlawful delivery of a controlled substance containing diazepam, finding that the State failed to sustain its burden of proving beyond a reasonable doubt that the tablets purchased from the defendant were in fact diazepam. The forensic scientist who examined the pills conducted a "physical identification" by comparing the tablets in question to pictures in a book, and concluded that they were diazepam. The witness did not describe the tablets or the publication used to make the comparison, and did not conduct a physical analysis. Because the tablets could have been look-alike substances, the court concluded that the State failed to meet its burden of proof to show that the tablets contained a controlled substance.

The court also reversed the conviction for unlawful delivery of a controlled substance containing hydrocodeinone. The forensic scientist testified that she did a physical

identification of the tablets by looking them up in a publication, and also performed an "analytical analysis" which lead her to conclude that the tablets contained hydrocodeinone. The witness gave no further description of the test. In concluding that the State failed to carry its burden of proof, the Appellate Court stated, "We do not know what types of tests were performed, how the tests were performed, whether the tests performed are conclusive or nonconclusive tests, or whether the tests performed are the types of tests typically performed to detect the presence of a controlled substance. [The witness's] testimony does not illuminate how she identified the substance as hydrocodeinone.

People v. Roberts, 338 Ill.App.3d 245, 788 N.E.2d 782 (2d Dist. 2003) Because 730 ILCS 5/5-9-1.1(a) authorizes the imposition of a street value fine only if the defendant is convicted of possession or delivery of cannabis or a controlled substance, the trial court erred by imposing a street value fine on a conviction for possession with intent to deliver of a look-alike substance. Similarly, because 730 ILCS 5/5-9-1.1(b) authorizes the imposition of a Trauma Center fine only where a street value fine is authorized, the trial court erred by imposing a $100 Trauma Center fine.

People v. American Daily Publishing, 134 Ill.App.3d 1028, 481 N.E.2d 859 (5th Dist. 1985) A newspaper owned and published by the defendant ran an ad for diet pills. The ad was placed by a third party identified as D.M., and listed a Missouri post office box and phone number for placing orders. The trial court dismissed an information charging defendant with a violation of Ch. 56½, ¶1404(b), which makes it "unlawful for any person knowingly to . . . advertise . . . a look-alike substance.") The Appellate Court held that the owner and publisher of a newspaper which publishes an advertisement for diet pills is not an "advertiser" within the meaning of ¶1404(b). The Court held that to "advertise" within the meaning of ¶1404(b), one must attempt "to induce others to acquire a look alike substance." Here, defendant merely sold space in a newspaper for the ad; it did not attempt to induce any person to acquire a look-alike substance.

§13-3(b)
Possession

§13-3(b)(1)
Generally

Illinois Supreme Court

People v. Schmalz, 194 Ill.2d 75, 740 N.E.2d 775 (2000) To sustain a charge of unlawful possession of cannabis, the State must prove that the defendant: (1) knew that cannabis was present, and (2) had the cannabis within her immediate and exclusive possession or control. Whether a defendant had knowledge and control are questions of fact to be decided under the circumstances of each case. However, mere proximity to contraband does not establish actual possession. Here, the evidence was sufficient to permit a rational trier of fact to conclude that defendant was in possession of cannabis and drug paraphernalia. A police officer who had been admitted to a single family residence to look for the driver of a parked vehicle noticed smoke and the odor of burning marijuana coming from an upstairs bedroom. The officer knocked on the door and was invited to enter. He observed the defendant sitting on the floor near drug paraphernalia and three clear plastic bags of cannabis. Another bag of cannabis and additional paraphernalia were found on a couch. When asked what the group was doing,

defendant responded, "[W]e're having a party." The court concluded that viewing the evidence most favorably to the prosecution, there was a rational basis to find that defendant knew of the contraband and exercised control over it.

People v. Pintos, 133 Ill.2d 286, 549 N.E.2d 344 (1989) The State's evidence showed defendant and a man named Sosa drove from Florida with cocaine. They arrived at the hotel room of Diaz, with Sosa carrying an open cardboard box containing cocaine. Defendant knocked on the door, and he and Sosa were allowed in. Shortly thereafter, the three men went into the room next door, with Sosa carrying the box. The defendant and Sosa spent the night in the room. The next morning, an undercover agent went to Diaz's room to purchase cocaine. Diaz went to defendant's and Sosa's room, got the box containing cocaine, and brought it back to the undercover agent. The Court held that a rational trier of fact could infer from this evidence that defendant had knowledge that the cardboard box contained cocaine.

Illinois Appellate Court

People v. Crane, 2020 IL App (3d) 170386 The police were called to a hotel after defendant and a co-defendant (Weston) failed to check out of their room on time. A search of their room resulted in discovery of suspected cannabis residue. Subsequently, a drug dog alerted on both of their vehicles. A search of the vehicles led to the recovery of five cannabis cigarettes from defendant's vehicle and four bags of cannabis from Weston's vehicle. Defendant was convicted of multiple cannabis possession offenses.

On appeal, defendant did not challenge his conviction of possession of cannabis that was based on the cannabis cigarettes recovered from his car. He did, however challenge his convictions based on accountability for the cannabis recovered from Weston's vehicle. The Appellate Court agreed and reversed those convictions. While defendant and Weston shared the same hotel room the previous night, the cannabis in question was found in a black bag in Weston's vehicle. Surveillance video from the hotel showed that Weston, alone, took the black bag to and from his vehicle. While defendant and Weston each had similar cell phones, there was no evidence to establish that the phones were being used to facilitate the transportation of cannabis. And, there was no evidence to refute defendant's testimony that he had been traveling several hours behind Weston and therefore was not acting as a decoy or lookout vehicle as part of some common plan to traffic drugs. Instead, the State's case relied largely on speculation, which cannot support a conviction. Defendant's convictions of possession of cannabis with intent to deliver and possession of 500-2000 grams of cannabis were reversed.

People v. Jones, 2014 IL App (3d) 121016 Defendant was convicted of cannabis trafficking, 720 ILCS 550/5.1(a), an offense requiring the State to prove that defendant knowingly possessed the cannabis. Defendant argued on appeal that the State failed to prove he knew the FedEx package he possessed contained cannabis.

Knowledge can rarely be shown through direct proof and may instead be established by defendant's acts, declarations, or conduct supporting the inference that he knew about the cannabis. While a trier of fact may infer knowledge from suspicious behavior, mere possession of an unopened package containing cannabis is insufficient to prove knowledge.

Here, there were numerous suspicious circumstances that would have allowed a trier of fact to find that defendant knew about the cannabis in the FedEx package. Defendant picked up the package from his stepmother's house where it had been delivered. He then took possession of the package even though it did not have his name or address on it. He claimed

it was wrongly delivered and left with the package to ostensibly return it to FedEx, but was not driving in the direction of the FedEx facility when he was stopped. Defendant also made a series of false statements about the package after he was arrested. Based on these factors, a rational trier of fact could easily infer that defendant knew the package contained cannabis.

The court rejected defendant's reliance on the First District's decision in **People v. Hodogbey**, 306 Ill. App. 3d 555 (1999) for the proposition that "suspicious behavior in the vicinity of narcotics will not suffice as proof of knowledge as to their presence." The court agreed with the Second District's decision in **People v. Brown**, 2012 IL App (2d) 110640, pointing out that the proposition stated in **Hodogbey** was actually based on a misreading of an Illinois Supreme Court case, **People v. Jackson**, 23 Ill. 2d 360 (1961), which stated the exact opposite, *i.e.*, that suspicious behavior *may* constitute proof of knowledge.

People v. Love, 209 Ill.App.3d 816, 568 N.E.2d 192 (3d Dist. 1991) At defendant's trial for possession of cocaine with intent to deliver, evidence was presented that defendant and a co-defendant were sitting in the back seat of a car and that a bottle containing several small plastic bags of cocaine was found on the rear floorboard. The trial court excluded evidence that the defendant and co-defendant had only about $2.00 in their possession at the time of arrest, while the two occupants of the front seat had about $365 between them. The Appellate Court held that the trial court's ruling was erroneous. Although there was no fingerprint evidence to connect any of the passengers to either the bottle or any of the small bags, a police officer testified that the bottle was three-quarters full of cocaine. Therefore, it could be inferred that additional bags had been in the bottle but had been used or delivered prior to the arrest. Given the lack of direct evidence of possession, the fact that defendant had relatively little money while the front seat passengers had $365 would have supported defendant's theory that he was not involved in any sale or delivery and did not possess the cocaine.

People v. McLemore, 203 Ill.App.3d 1052, 561 N.E.2d 465 (5th Dist. 1990) Defendant was convicted of possession of a controlled substance with intent to deliver. The car in which the defendant and three other people were riding was stopped on the highway, based upon a radio dispatch concerning defendant's failure to appear at a penal institution. Defendant was arrested, handcuffed, and subjected to a patdown search. Four or five $100 bills were found on defendant. Defendant asked, and was allowed, to lie on the ground. She remained on the ground, on her left side, until she was placed in a squad car. While checking her handcuffs, an officer found a topless Newport cigarette box in the left front pocket of defendant's blue jean vest. The box contained 15 packets of cocaine. The defendant testified that she had been given the box by Williamson, a passenger in the car, and that she had no knowledge of its contents. Another occupant of the car testified that he saw Williamson with a Newport box before they got into the car. The Appellate Court held that even though defendant denied any knowledge of the cocaine in the Newport box, "the jury was not required to accept her testimony." Furthermore, her knowledge was proven by circumstantial evidence; the cocaine was in her left vest pocket, and she leaned over the car during the patdown and laid on her left side.

People v. Binns, 27 Ill.App.3d 978, 327 N.E.2d 369 (1st Dist. 1975) Evidence was insufficient to convict defendant of possession of marijuana found in her apartment. Claim of defense witness - that he put marijuana in apartment and called police to get "back at" defendant - was not impeached; in addition, defendant testified that she had just returned to the apartment after being gone for several nights and that she had no knowledge of the

marijuana.

§13-3(b)(2)
Constructive Possession

Illinois Supreme Court

People v. Givens, 237 Ill.2d 311, 934 N.E.2d 470 (2010) Defendant was proven guilty beyond a reasonable doubt of possession of a controlled substance where cocaine was found on a night stand next to the bed where she and her boyfriend were sleeping while staying as overnight guests in a friend's apartment.

Although the fact that a defendant has control over premises where drugs are found gives rise to an inference of knowledge and possession, control over premises is not required for a conviction of possession of a controlled substance. More than one person can exercise joint possession over a controlled substance, if each has the intention and power to exercise control.

Because the evidence showed that the defendant and her boyfriend had control had control over the bedroom when the drugs were found, an inference of knowledge and possession arose although the couple were mere guests. Defendant and her boyfriend slept in the bedroom overnight, and defendant locked the front door of the apartment when her friend said that she was going out. There was also a reasonable basis to infer that defendant had knowledge of the drugs, which were on a night stand next to the bed and thus in a location in which it could be reasonably expected that overnight guests would store their belongings. Finally, the tenant testified that the drugs did not belong to her and that no one else was staying in the apartment. Under these circumstances, there was sufficient evidence to establish possession. (See also, **APPEAL**, §2-6(a) & **COUNSEL**, §13-4(b)(4)).

Illinois Appellate Court

People v. Davis, 2021 IL App (3d) 180146 Evidence was insufficient to establish defendant's constructive possession of firearms and a scale containing cocaine residue found in a residence searched pursuant to a warrant. While there was evidence that defendant had sold drugs from that residence on two prior occasions, he was not present in the residence on the date it was searched. Thus, defendant did not have immediate access to the drugs and firearms when they were found.

The State failed to establish defendant's control over the residence where there was no evidence that he owned, rented, or lived there. In fact, there was uncontradicted evidence that defendant lived elsewhere. Defendant was seen coming and going from the residence on the date of the search and the day prior, but those observations merely established his presence, not habitation. Mail with defendant's name was found in the residence, but the State presented no evidence as to whether it was recent mail. And, there was mail addressed to other persons throughout the residence, as well. Additionally, while defendant's wallet was found in the home, his identification in that wallet did not list the residence as his address.

Further, the State failed to establish defendant's relationship to the seized items. No physical evidence linked defendant to the contraband. In addition to the named tenant, defendant and another individual were seen coming and going from the residence in the days before the search. Those other individuals were just as likely as defendant to have brought the contraband into the home. The firearms were found on the top shelf in the closet of the named tenant's bedroom, and the scale containing cocaine residue was stored out-of-sight in a kitchen cabinet. The evidence was insufficient to prove beyond a reasonable doubt that

defendant had knowledge and control over the contraband. Accordingly, his convictions were reversed.

People v. Horn, 2021 IL App (2d) 190190 The police lacked probable cause to arrest defendant for drugs found in the trunk of a vehicle. The defendant was a passenger in the vehicle, and while the driver appeared nervous, the police testified that defendant remained calm and polite. Although the two occupants provided different accounts of their purpose for driving from Wisconsin to Chicago, and defendant had previously driven the car, the appellate court found that it was not reasonable for the police to infer that defendant knew the car's trunk contained an urn full of cocaine.

The Appellate Court recognized that in **Maryland v. Pringle**, 540 U.S. 366 (2003), the Supreme Court found the police had probable cause to believe all passengers in a vehicle knew of the drugs hidden in an armrest. But that inference had not been extended to the trunk, and as in **People v. Drake**, 288 Ill. App. 3d 963 (1997), the arrest was illegal. Accordingly, the defendant's postarrest admission that the urn contained his father's ashes should have been suppressed.

People v. Moore, 2020 IL App (1st) 182535 The trial court erred when it failed to ascertain whether the jury "understood" each of the principles contain in Rule 431(b). Under the first prong of the plain error test, the error warranted a new trial on one of the two counts of possession of a controlled substance with intent to deliver.

Defendant had been charged with possession of cocaine and possession of marijuana, both with intent to deliver. Most of the cocaine was found on his person when the police stopped him in the vestibule of an apartment building. However, the marijuana was found in a bedroom of a nearby apartment and therefore the State had to prove constructive possession as to the marijuana. The court found evidence on both sides of the question, and concluded it was closely balanced. On one hand, defendant tried to enter that apartment, and a letter addressed to him at that address was found in that bedroom. On the other hand, defendant's identification listed a different address, and there were numerous other people in the apartment. Because the question of constructive possession was close, the court ordered a new trial on the marijuana count.

People v. Jackson, 2019 IL App (1st) 161745 The State presented sufficient circumstantial evidence to prove defendant's constructive possession of heroin. During a search pursuant to a warrant, police found the heroin in a hidden compartment in the first-floor apartment of a three-unit building. Although defendant was seen exiting and entering the basement unit, not the first-floor unit, and police found two other people in the first-floor unit, several other facts pointed to defendant's possession of the drugs: he owned the building and paid all the utilities, police found tools of the heroin trade (scale and blender) in the basement, he admitted to disposing of other drugs as the police executed their warrant, and the heroin was found in a complex mechanical hidden wall panel that would have been difficult for a tenant or anyone other than the owner to implement and hide. Finally, defendant reacted violently to his arrest, thrashing and head-butting officers, showing a consciousness of guilt.

People v. Terrell, 2017 IL App (1st) 142726 Constructive possession exists where a defendant has no personal control over the contraband but has control over the area where it is found. The State must prove that the defendant had knowledge of the presence of the contraband and exercised "immediate and exclusive" control over the area where it was

found. Generally, living in the location where contraband is found is sufficient proof of the control required for constructive possession.

The police executed a search warrant on a two-bedroom apartment. The man who rented the apartment was present during the search, but defendant was not. The police recovered the following items in the living room: (1) two prescription bottles with defendant's name on them and an address that was different than the address of the apartment being searched; (2) an adult probation card with defendant's name; (3) defendant's passport; and (4) a framed photograph of defendant. In the dining room, the police recovered a duffle bag containing clothing for a very large male. Defendant wears 4XL clothing and is much larger than the man who rented the apartment.

The police found a hidden compartment in a hallway closet that contained drugs, money, digital scales, mixing agents and containers, firearms and ammunition. As they were conducting the search, the police saw defendant in a pickup parked in front of the apartment. The police found a hidden compartment in the pickup that was similar in some ways to the hidden compartment in the hallway closet, but contained no drugs, weapons, or paraphernalia.

The trial court found defendant guilty of possession of a controlled substance with intent to deliver and unlawful use of a weapon by a felon.

The State failed to prove that defendant had constructive possession of the items found in the hidden compartment of the hallway closet. Evidence of residency often takes the form of rent receipts, utility bills or mail, none of which were linked to defendant in this case. The items that were linked to defendant - prescription bottles, probation card, passport, framed photo, and the bag of large men's clothing - were insufficient to tie defendant to the contraband located in a hidden compartment. The court found the connection between the hallway compartment and the compartment in the pick-up "to be tenuous at best." And the mere fact that defendant was found sitting in a pick-up near the apartment - mere presence - did not prove constructive possession.

People v. Fernandez, 2016 IL App (1st) 141667 A defendant has constructive possession of contraband where he knows the contraband was present and exercised "immediate and exclusive" control over the area where the contraband was found.

The police obtained a search warrant for a house and garage. On the evening before they conducted the search, the police saw defendant get out of car and engage in a suspected narcotics transaction. The police arrested defendant and found him in possession of suspected heroin. They also recovered keys from defendant. They found suspected heroin and a woman inside defendant's car. (The State never charged defendant with any offenses related to the heroin recovered from defendant or his car.)

The following morning the police searched the home and garage. The keys found on defendant opened the locks to both the home and the garage. The police found an unidentified man in the house. In a bedroom, the police found a gun underneath a mattress, a passport and insurance cards with defendant's name, and framed photographs of defendant and the woman in the car. The closet had men's and women's clothing. The police found more framed photographs of defendant and the woman in the living room. In the garage, the police found three guns, ammunition, and heroin in a broken van with flat tires. The parties stipulated that defendant received mail at another address.

The court held that the State failed to prove defendant was in constructive possession of the heroin and guns found inside the house and garage. The court noted that evidence of residency, which often takes the form of rent receipts, utility bills, or mail, did not link defendant to the house and garage. Instead, the only mail addressed to defendant linked him

to another residence. Although the police found numerous personal effects tied to defendant in the house (insurance cards, passport, framed pictures) and defendant's keys unlocked the house and garage doors, none of this evidence showed defendant's control over the premises. And the presence of another man in the house weighed against a finding that defendant controlled the premises.

Even if defendant had some connection with the residence, no evidence placed him there on the date of the search. All the contraband was concealed, either under a mattress or inside the inoperable van. Even assuming defendant had access to the house and garage, nothing suggested he knew about the hidden contraband.

The court reversed defendant's convictions.

People v. Tates, 2016 IL App (1st) 140619 To convict a defendant of possession of controlled substances, the State must prove that the drugs were in defendant's immediate and exclusive control. Constructive possession does not require actual dominion over the drugs, but can be inferred from an intent and capability to maintain control. Control of the location where the drugs are found is not essential to prove constructive possession.

The police executed a search warrant on a single family house. Inside they found several men including defendant and another man who were sitting at a dining room table covered with drugs and packaging materials. There was no evidence defendant was touching any of the items on the table. When the police entered, all the men fled and defendant was arrested outside the house. No weapons, drugs, or money were found on defendant.

The court held that the State failed to prove that defendant possessed the controlled substances. There was no evidence that defendant exercised control over the premises such that a trier of fact could infer his control over the drugs. Although defendant was sitting at the dining room table when the police entered, there was no evidence he touched any of the drugs or other materials on the table. While defendant must have been aware of the drugs, nothing proved that he was in possession of them.

Defendant's conviction for possession of controlled substances was reversed.

People v. Moore, 2015 IL App (1st) 140051 Defendant was convicted of unlawful possession of ammunition by a felon and possession of a controlled substance after police officers executed a search warrant for the home of defendant's great-grandmother. Defendant was observed jumping out a window as police approached the house. Officers recovered ammunition from a desk in the living room and from the basement rafters, and also found what they suspected to be cocaine in the rafters. In addition, in one of three bedrooms officers discovered mens' clothing and a letter that was addressed to the defendant at the house.

Defendant's great-grandmother testified that defendant did not live at the house, but that he had been at the house on the day of the search and had received mail there. In addition, defendant's sister and a friend testified that he did not live at the house.

The Appellate Court reversed the convictions, finding that the evidence failed to prove that defendant had constructive possession of the contraband. Even taken most favorably to the State, the evidence did not establish that defendant had knowledge of the contraband. First, although officers found mail addressed to defendant and men's clothing in the bedroom, the contraband was not found in the bedroom. In addition, the mail had been postmarked more than six months earlier and the clothing was not specifically linked to defendant.

Even had the State proven that defendant knew of the contraband, there would have been insufficient evidence that he had immediate and exclusive control over the area where the contraband was found. Although residency at property where contraband is found may show control of the premises, there was insufficient evidence here to show that defendant

lived on the premises. Not only was the letter found in the bedroom six months old, but the clothing was not shown to belong to defendant. In addition, defendant presented three witnesses who testified that he did not live at the house. Under these circumstances, defendant did not have exclusive control of the area where the contraband was found.

People v. Ellison, 2013 IL App (1st) 101261 Although in some cases the quantity of controlled substances is sufficient in and of itself to prove intent to deliver beyond a reasonable doubt, where the quantity of drugs could be consistent with personal use there must be additional evidence in order to justify a finding of intent to deliver. Here, possession of 3.112 grams of cocaine and .4 grams of heroin was consistent with personal use. Thus, additional evidence was required.

The court held that there was insufficient additional evidence to justify a finding of intent to deliver. First, although the defendant was carrying two types of drugs and the variety of drugs is a relevant consideration, the mere fact that a defendant possesses more than one type of drug does not establish intent to deliver. The court noted that the State failed to present any precedent in which the mere possession of two types of drugs in quantities suitable for personal use has been held to show intent to deliver.

Second, although defendant possessed no drug paraphernalia consistent with personal use of the substances, he also possessed no paraphernalia consistent with selling controlled substances.

Third, the State failed to present expert testimony concerning the purity of the drugs or that they were packaged for sale. In any event, the packaging would not have been a significant indicator of intent to deliver where the evidence suggested that defendant had just purchased drugs at a house which police were watching due to a citizen complaint that drugs were being sold. If defendant purchased drugs just before his arrest, it would have been expected that the drugs would be packaged for sale.

Fourth, although defendant was in possession of a cell phone, in view of the modern proliferation of mobile communication devices the court questioned whether possession of such a device is a reliable indicator of intent to deliver controlled substances.

Fifth, defendant was not in possession of cash.

The court concluded that under these circumstances, the evidence was insufficient to establish intent to deliver beyond a reasonable doubt. Defendant's conviction for possession of controlled substances with intent to deliver was reduced to possession of a controlled substance.

People v. Johnson, 2013 IL App (4th) 120162 Defendant was a passenger in a car stopped by the police as it was traveling from Chicago to St. Louis. The police recovered heroin in the possession of a female passenger. The female testified at trial that she and defendant accompanied the driver on a trip to Chicago where the driver purchased heroin, with knowledge that the purpose of the trip was to purchase heroin. They all used a small amount of the heroin on the return trip. She was holding the heroin because the driver and defendant believed that the police were less likely to search a woman if they were stopped, and after they were stopped, defendant instructed her to hold onto the heroin. The driver was going to sell the heroin once they returned to St. Louis. A jury convicted defendant of possession with intent to deliver.

The Appellate Court found the evidence was sufficient to prove that defendant constructively possessed the heroin as a principal. He exercised dominion over the heroin by (1) traveling to Chicago, knowing that the trip was for the purpose of purchasing heroin, (2) actually possessing a small amount of the heroin when using it, and (3) acting to conceal the

heroin by ordering the female passenger to hold it because he believed that the police were less likely to search a woman.

People v. Scott, 367 Ill.App.3d 283, 854 N.E.2d 795 (1st Dist. 2006) Defendant was improperly convicted of possession of a controlled substance where the evidence failed to show that he constructively possessed cocaine discovered in a locked mailbox. The evidence showed that defendant twice accompanied a woman who went to the mailbox, unlocked it, removed an item, and handed it to the defendant. Defendant did not have a key to the mailbox and did not access it at any time. To support a finding of possession of a controlled substance, the State must prove beyond a reasonable doubt that defendant had knowledge of and immediate control over the substance. Constructive possession may exist, despite the absence of actual, personal, present dominion over a controlled substance, if there is both intent and capability to maintain control and dominion. However, mere presence in the vicinity of a controlled substance does not establish constructive possession. The court concluded that because the defendant did not have access to the key which opened the mailbox, the State failed to show that he was capable of maintaining control and dominion over the controlled substances. Although habitation of premises where narcotics are discovered raises an inference of control over the substances, the evidence here showed only that defendant might have at times lived at the apartment, not that he had control of the locked mailbox.

People v. Hodogbey, 306 Ill.App.3d 555, 714 N.E.2d 1072 (1st Dist. 1999) To sustain a conviction for possession of a controlled substance with intent to deliver, the State must prove beyond a reasonable doubt that defendant had knowledge of the presence of a controlled substance, the substance was in his immediate control and possession, and the amount exceeded that which could be for personal use. The evidence was insufficient to establish defendant's knowledge that a package from Thailand contained a controlled substance. The evidence established that defendant accepted a package that was addressed to him, but did not open or attempt to hide it. Instead, he left it unopened in the middle of his living room floor as he went about other business. In addition, defendant did not resist or flee when he was approached by officers on the street a few minutes later, but gave the officers the keys to his apartment. Although defendant left his apartment after receiving the package and returned only after looking up and down the street, such behavior did not establish beyond a reasonable doubt that he knew the package contained cocaine. "[S]uspicious behavior in the vicinity of narcotics will not suffice as proof of knowledge as to their presence."

People v. Macias, 299 Ill.App.3d 480, 701 N.E.2d 212 (1st Dist. 1998) To prove unlawful possession of a controlled substance, the State must show that the defendant knew of the substance and that it was in his immediate and exclusive control. Possession of a controlled substance may be actual or constructive. Constructive possession exists where defendant has "no actual personal present dominion" over the contraband, but has the intent and capability to "maintain control and dominion" over it. Constructive possession may be established by showing that the defendant controlled the premises where the contraband was found. The State failed to prove beyond a reasonable doubt that defendant was in constructive possession of controlled substances. Defendant provided a reasonable, uncontradicted explanation for his possession of keys which opened the apartment in question, there was corroboration for that explanation, and there was no indication defendant lived in the apartment. In addition, even if defendant had access to the apartment, it did not necessarily follow that he knew about hidden contraband. See also, **People v. Strong**, 316 Ill.App.3d 807, 737 N.E.2d 687 (3d Dist. 2000) (where defendant was only one of four adult inhabitants of a residence and

was not engaged in any activity suggesting that he had control of contraband found on a coffee table in the living room, the evidence was insufficient to show constructive possession).

People v. Minniweather, 301 Ill.App.3d 574, 703 N.E.2d 912 (4th Dist. 1998) In a prosecution for possession of a controlled substance, actual possession need not be proven if constructive possession can be inferred. Constructive possession is shown where, although an individual is no longer in physical control of contraband, "he once had physical control . . . with intent to exercise control in his own behalf, and he has not abandoned [it] and no other person has obtained possession." The court rejected the argument that for constructive possession to be shown, defendant must control the premises on which the substances were found. Although knowledge of the substance and control over it may be inferred where narcotics are found on premises under the defendant's control, "the inverse inference does not follow." Thus, where the substance is found on premises that are *not* under the defendant's control, such lack of control is not dispositive. "Rather, it is defendant's relationship *to the contraband* that must be examined." Here, there was strong circumstantial evidence that defendant constructively possessed controlled substances - defendant fled from police and was out of sight for only brief periods of time, there were no other persons in the area, defendant hid from police and did not respond to orders to come out, the drugs were discovered within five or six feet of defendant's hiding place, and there was no evidence that the residence where defendant was hiding was a "drug house."

People v. Brown & Cooper, 277 Ill.App.3d 989, 661 N.E.2d 533 (1st Dist. 1996) The evidence was sufficient to sustain a conviction for possession of substances found near where defendant was hiding in a crawl space. Though mere proximity to contraband does not establish possession, there was other evidence of defendant's possession. First, although the crawl space extended over several rooms, the drugs were located only five feet from where Brown had been sitting. In addition, the substance was in shopping bags that were in plain view and readily accessible to defendant. Under such circumstances, "it is difficult to conceive that Brown was unaware of the presence of the drugs." Although Brown neither leased nor resided at the apartment, he exercised sufficient control over the crawl space to justify a finding of constructive possession. Although there were no stairs leading to the space, Brown knew of its existence, knew how to climb into it, and was able to cover the entrance before police entered the room.

People v. Jones, 278 Ill.App.3d 790, 663 N.E.2d 461 (3d Dist. 1996) The evidence showed that when police executed a search warrant for a residence, they found a crumbled rock of cocaine and several cocaine pipes in a kitchen occupied by four or five people. When officers went upstairs to look for a reported assault rifle, they found defendant and Marcus Miller hiding under clothes in a closet. Defendant had no money or contraband on his person, but Miller had $223. In addition, a baggie containing 2.3 grams of cocaine was found hidden under some clothes on the floor of the closet. A police officer testified as an expert on drug paraphernalia and stated that cocaine and money are seldom held by the same person. The expert also testified that the cocaine in the baggie was suitable for distribution (rather than personal use) because it consisted of twenty rocks of cocaine and because several clear plastic baggies and a pager number were found elsewhere in the house. Defendant testified that he went to the house looking for Miller. A few minutes after he arrived, police forced their way inside. Defendant said that he panicked, saw Miller run upstairs, and followed him into the closet. Defendant insisted that he did not see any drugs or drug paraphernalia while he was

in the residence Miller testified that he had the cocaine and tried to stuff it under the closet wall while he was hiding.

The Appellate Court held that the evidence was insufficient to prove defendant's possession. Although flight may be considered as evidence of consciousness of guilt, mere presence at the scene of a crime, "even when coupled with flight," does not establish guilt. Instead, the State must show some link between defendant and the cocaine. The evidence here was insufficient to show any such link. A relatively small quantity of cocaine was involved, so it was possible that Miller hid the cocaine without the defendant's knowledge. In addition, the State failed to present any reliable evidence to rebut Miller's admission that he had planted the cocaine. Furthermore, because the record contained no evidence that defendant had been in the kitchen, the State failed to show that he was aware of the narcotics paraphernalia.

People v. Adams, 242 Ill.App.3d 830, 610 N.E.2d 763 (3d Dist. 1993) Defendant was convicted of armed violence predicated on unlawful possession of a controlled substance. The evidence showed that when police entered an apartment they found defendant standing in front of the toilet in a bathroom. A gun and $220 were found in the bathtub, and packets of cocaine were found floating in a bucket under the bathroom sink. Additional cocaine was found in a refrigerator, and other guns were found in the house. Defendant did not live in the apartment, but was waiting there to talk to a resident. Defendant testified that he went to use the bathroom just before the police arrived.

The Court reversed the conviction for armed violence based on unlawful possession of the cocaine found under the bathroom sink. To establish possession of a controlled substance, the State must prove that the defendant knew that narcotics were present and that the substances were within his immediate and exclusive control. Because the cocaine was not found on defendant's person, the State could establish that he had knowledge and control only if it could show that he controlled the premises. Since defendant clearly had no control over the premises, and there was no other evidence to connect him to the cocaine under the sink, the conviction rested on his mere presence in the vicinity of controlled substances. See also, **In re K.A.**, 291 Ill.App.3d 1, 682 N.E.2d 1233 (2d Dist. 1997) (evidence was insufficient to prove constructive possession; the narcotics were in an open room of a drug house; the minor did not control the premises, no narcotics were on his person, and he had been present only a few minutes when the raid occurred).

People v. Ray, Council & Banks, 232 Ill.App.3d 459, 597 N.E.2d 756 (1st Dist. 1992) There was insufficient evidence of control over an apartment to establish constructive possession of cocaine found on a coffee table. Mere proximity does not establish possession. Moreover, each of the three defendants gave a different home address, they had no keys to the apartment, and they kept no clothing or personal effects there.

People v. Rouser, 199 Ill.App.3d 1062, 557 N.E.2d 928 (3d Dist. 1990) Police entered a residence and saw two men in the bathroom and a third man exiting the bathroom. The officers heard the toilet flush, forced their way into the bathroom, saw the defendant and another man "shuffling around," and found .3 grams of cocaine in an open clothes hamper and a pipe used for smoking drugs. In the kitchen, police found a bottle of grain alcohol, steel rods, test tubes and items used in cutting and packaging cocaine for sale. The defendant possessed $250 in cash. The rental agreement for the residence was in a third party's name, but documents belonging to defendant, including a social security card application which listed the residence as defendant's mailing address, were found on the premises.

The Appellate Court held that the evidence was sufficient to prove that defendant possessed the cocaine in the bathroom clothes hamper. The defendant was in the bathroom and was only 1½ feet from the open hamper and the activities of the men in the bathroom were such that a reasonable person could conclude that they were disposing of illegal drugs. The Court also held, however, that the evidence was insufficient to prove intent to deliver. The factors to consider regarding an intent to deliver include: the amount of contraband possessed (i.e., more than that likely to be for personal use), possession of a combination of drugs, the manner in which the drugs are kept, the presence of paraphernalia used in the sale of drugs, the presence of a large amount of cash, and the presence of weapons. In finding the defendant guilty, the trial judge indicated that defendant did not have constructive possession of the residence, but only the bathroom. Thus, the drugs and paraphernalia found outside the bathroom "were largely irrelevant in determining whether the defendant . . . [had] intent to deliver." Furthermore, the pipe found in the bathroom would indicate the cocaine was for consumption rather than for sale. The conviction was reduced to unlawful possession. See also, **People v. Rivera**, 293 Ill.App.3d 574, 688 N.E.2d 752 (1st Dist. 1997) (possession of one ounce of cocaine insufficient to show intent to deliver).

People v. Gore, 115 Ill.App.3d 1054, 450 N.E.2d 1342 (3d Dist. 1983) The evidence did not prove that defendant had constructive possession of cannabis found under the seat of a car he was driving; the vehicle was owned by a third party, the cannabis was found in a place where it was not visible to the driver, and there were other passengers who could have been responsible.

People v. Lawrence, 46 Ill.App.3d 305, 360 N.E.2d 990 (4th Dist. 1977) Police officers observed defendant and two other persons near an air conditioning outlet. Defendant was sitting on the outlet, another person was standing next to him, and the third person was standing three or four feet away. When the police approached, defendant jumped from the outlet, threw a bag of cannabis into the alley and ran. He was seized, and packets of cannabis were found on his person. The police found a bag of cannabis approximately where police thought the thrown bag would be, and found two additional bags of cannabis on the air conditioning outlet near where defendant had been sitting. The Appellate Court held the defendant was properly convicted of possessing the cannabis found on his person and in the bag thrown in the alley. However, the defendant was erroneously convicted of possessing the cannabis found on the air conditioning outlet; there was no showing that he had actual, constructive or joint possession of those bags. "Knowledge of the location of narcotics is not the equivalent of possession."

People v. Day, 51 Ill.App.3d 916, 366 N.E.2d 895 (4th Dist. 1977) Police stopped and searched defendant's automobile, which contained six other passengers. The police found 450 grams of cannabis in a large grocery bag on the floor beneath the legs of the passenger seated next to defendant in the middle of the front seat, 10.4 grams of cannabis in a plastic bag in the glove compartment, and one unsmoked cannabis cigarette between the back seat and the backrest. Defendant was convicted of the unlawful possession of between 30 and 500 grams of cannabis. The Appellate Court held that the evidence was insufficient to prove that defendant exercised any control over the grocery sack on the floor or the cigarette found in the back seat. However, defendant was properly found to be in constructive possession of the cannabis in the glove compartment, since there was no evidence that anyone else had put it there.

People v. Howard, 29 Ill.App.3d 387, 330 N.E.2d 262 (4th Dist. 1975) Police entered a motel room not registered to the defendant but occupied by him and two other persons. A bag of marijuana was found near the headboard of one of the beds in the room. The Appellate Court found the evidence insufficient to support defendant's conviction for possession of marijuana.

§13-3(b)(3)
Simultaneous Possession

Illinois Supreme Court

People v. Jones, 174 Ill.2d 427, 675 N.E.2d 99 (1996) Defendant was convicted of possession, with intent to deliver, of more than one but less than 15 grams of a substance containing cocaine. When he was arrested defendant had five packets of a white rocky substance which weighed 1.4 grams. The State tested only two of the packets, which had a combined weight of .59 grams. Defendant stipulated to the result of the laboratory test, which indicated that the two tested packets contained cocaine. However, the remaining three packets were not tested and were not the subject of a stipulation. The Supreme Court held that the State failed to prove defendant possessed more than one gram of a substance containing cocaine. Where a defendant is charged with possession of a specified amount of a controlled substance, and a lesser included offense is available for possession of a smaller quantity, the weight of the substance is an essential element that must be proved beyond a reasonable doubt. Where a substance is packaged in separate containers, a sample from each container must be tested before the trier of fact can find that a controlled substance was present in that container. The Court recognized that where the defendant is in possession of tablets or capsules having the "same size, shape, color and density," a random sample may provide a basis to infer that all of the tablets contain the same substance. However, this rule is unavailable when the substance is merely "similar" and not identical in every respect.

Illinois Appellate Court

People v. Coger, 2019 IL App (1st) 163250 Separate convictions for delivery of heroin and delivery of cocaine were improper where both convictions were based on a single delivery of three packets which each tested positive for a mixture of the two drugs, disagreeing with **People v. Bui**, 381 Ill. App. 3d 397 (1st Dist. 2008). A drug user could not separate the substance into two separate drugs for separate use, so it would not further the purpose of the statute to punish defendant for two separate offenses. Further, the statute criminalizes possession of a "substance containing" certain illegal drugs not each of the ingredients within a single substance. And, there was no evidence that the defendant knew the substance contained more than one drug. Accordingly, one of defendant's delivery convictions was vacated.

People v. Miramontes, 2018 IL App (1st) 160410 Counsel's stipulation to the quantity of methamphetamine constituted ineffective assistance where three separate bags of a whitish substance had been recovered by the police but were combined before any of the bags could be tested independently. Relying on **People v. Coleman**, 2015 IL App (4th) 131045, the Court concluded that it could only speculate about whether all three of the bags contained methamphetamine prior to combining them. Because defendant may have been convicted of possession of a lesser quantity had counsel not stipulated to the combined quantity, defendant was prejudiced, and the matter was reversed and remanded for a new trial.

People v. Marzonie, 2018 IL App (4th) 160107 Defendant was convicted of four meth-based charges based on his possession of meth, various precursors, and manufacturing material. Defendant alleged that the counts all merge into Count 1, "participating in the manufacture of meth," under the one-act, one-crime rule. The court disagreed, finding that the three remaining convictions – possession of methamphetamine; possession, transportation, or storage of a methamphetamine precursor in any form other than a standard dosage form with the intent to manufacture; and possession, transportation, or storage of methamphetamine manufacturing material with the intent to manufacture – are not based on the same act. Although closely related, the separate acts support multiple convictions. Participation in particular includes merely assisting in the production of meth, a different act than possession.

People v. Coleman, 2015 IL App (4th) 131045 Where a defendant is charged with possessing a specific amount of an illegal drug and there is a lesser included offense involving possession of a smaller amount, the weight of the substance is an essential element of the offense and must be proven beyond a reasonable doubt. Thus, where the suspected contraband was seized in separate containers, the State can carry its burden concerning the aggregate weight only if it can show that each of the packages contained the controlled substance. Although random testing may suffice where contraband consists of identical items such as tablets, if loose powder is involved the State must test each of the separate containers in order to carry its burden.

People v. Pittman, 2014 IL App (1st) 123499 The simultaneous possession of different types of controlled substances will not support more than one conviction and sentence unless the statute expressly authorizes multiple convictions. **People v. Manning**, 71 Ill.2d 132, 374 N.E.2d 200 (1978). Where defendant threw 1.8 grams of heroin into a garbage can as he was fleeing police, and after his arrest led police to an additional 3.1 grams of heroin concealed in the wheel well of a boat located in an adjacent vacant lot, the court found that defendant engaged in separate rather than simultaneous acts of possession.

An "act" is any overt or outward manifestation which will support a different offense. Here, there was evidence to support a finding of an act of actual possession of the heroin which defendant discarded while fleeing the police. In addition, there was separate evidence of an independent act of constructive possession of the heroin found in the boat. Under these circumstances, two acts of possession occurred.

Even where more than one act occurred, multiple convictions are permitted only if the State apportioned each act to separate charges in the indictment or information. That requirement was satisfied here, because the State charged separate offenses based on the separate acts.

People v. Tilley, 2011 IL App (4th) 100105 When a defendant is charged with participation in the manufacture of a specific amount of a substance containing an illegal drug, and there is a lesser-included offense of a smaller amount, the weight of the seized substance is an essential element of the crime and must be proved beyond a reasonable doubt. While no court has defined what constitutes a single substance as opposed to multiple substances, courts have construed "substance" to include a mixture of different chemicals created by defendant. A byproduct of methamphetamine production can be considered a "substance" under the statute. **People v. McCarty**, 223 Ill.2d 109, 858 N.E.2d 15 (2006).

Defendant was charged with participating in the manufacture of between 100 and 400 grams of a substance containing methamphetamine. The police recovered a bag containing a

substance weighing 391.1 grams of a substance that tested positive for methamphetamine. A witness described the substance as consisting of both white, chunky powder and black chunks.

The court refused defendant's request to reduce defendant's conviction to a lesser offense because the methamphetamine could have been attributed to one of these materials, but not the other, and the State failed to weigh the materials separately. The substance was a mixture created during the manufacturing process and was blended together in a single container when recovered. The court extrapolated from the requirement that the contents of separate containers must be tested separately, that the contents of one container may be considered one substance. The State is generally entitled to establish the mass of a controlled substance without altering its condition or removing possibly identifiable, distinct, licit materials. The court also considered that the various ways in which the parties and the witness referred to the substance suggested that the black and white materials were less discrete than the defendant contended, allowing a reasonable trier of fact to find that the material was a single substance containing methamphetamine.

People v. Clemons, 275 Ill.App.3d 1117, 657 N.E.2d 388 (1st Dist. 1995) Public Act 89-404, which amended 720 ILCS 570/100 and 720 ILCS 570/401 to provide that the simultaneous manufacture, delivery, or possession of more than one controlled substance can result in multiple convictions, applies prospectively only.

People v. Jones, 260 Ill.App.3d 807, 633 N.E.2d 218 (4th Dist. 1994) Where the contents of several containers are combined *before* definitive testing is conducted, so that random samples of *each* container are subject to the testing, the weights of all the containers can be aggregated to determine the amount of substance possessed. See, however **People v. Jackson**, 134 Ill.App.3d 785, 481 N.E.2d 1222 (3d Dist. 1985), where the Court held that where samples of only *some* containers are subjected to definitive testing, the untested containers cannot be assumed to contain the same substance.

People v. Maiden, 210 Ill.App.3d 390, 569 N.E.2d 120 (1st Dist. 1991) Defendant was convicted of unlawful possession of more than 30 grams of a controlled substance (PCP) with intent to deliver. The Court found that the evidence was insufficient to establish that three liquor bottles seized from the defendant's house contained PCP. A chemist testified that all three bottles tested positive in a preliminary test for PCP, but that conclusive testing was performed on only one bottle. Because the State only proved possession of the PCP in one bottle, the conviction was reduced to possession of less than 30 grams of a controlled substance with intent to deliver.

People v. Kaludis, 146 Ill.App.3d 888, 497 N.E.2d 360 (1st Dist. 1986) A chemist is qualified to render an opinion concerning the entire substance based upon the testing of random samples. There was sufficient evidence for the jury to find that all of the tablets delivered by defendant contained the controlled substance based upon the test results of three randomly selected tablets which exhibited similar characteristics to the other tablets. See also, **People v. Saldana**, 146 Ill.App.3d 328, 496 N.E.2d 757 (2d Dist. 1986) (LSD).

People v. Ayala, 96 Ill.App.3d 880, 422 N.E.2d 127 (1st Dist. 1981) Defendant was convicted of possession of more than 30 grams of a controlled substance for possessing two bags of alleged heroin. The Court held that the evidence was insufficient to prove that both bags contained heroin, since only one of the bags was subjected to a spectrophotometer test (a

conclusive test for heroin). Though both bags were subjected to chemical color tests, those tests only showed that heroin "might be present."

§13-3(c)
Intent to Deliver

Illinois Supreme Court

People v. White, 222 Ill.2d 1, 849 N.E.2d 406 (2006) The court rejected defendant's argument that the evidence was insufficient to show possession of a controlled substance with intent to deliver. Because direct evidence of intent to deliver is rare, intent must usually be shown by circumstantial evidence. Among the relevant factors are: (1) whether the quantity of the controlled substance is too large to have been for personal consumption; (2) the drug's purity; (3) whether the defendant has weapons, large amounts of cash, drug paraphernalia, or items such as police scanners, beepers or cellular phones; and (4) the manner in which the controlled substance is packaged. Whether the evidence proves intent to deliver is determined on a case-by-case basis. The court found that the amount of cocaine - 1.1 grams - was consistent with either personal use or sale. However, because the cocaine was packaged in 12 individual baggies and defendant had $75 in cash but no paraphernalia consistent with personal consumption, there was a basis for a rational trier of fact to find intent to deliver. The court also noted that the arrest occurred in an area of high drug activity, and that defendant would have had no reason to carry items like cutting agents or a scale once the cocaine was packaged for sale.

People v. Bush, 214 Ill.2d 318, 827 N.E.2d 455 (2005) The Supreme Court rejected a challenge to a conviction for possession of cocaine with intent to deliver holding that the State proved intent to deliver beyond a reasonable doubt, The defendant contended that the finding of intent to deliver was based on an officer's observations of two suspected narcotics transactions, but neither of the suspected buyers had been detained. The defendant argued that she retained cocaine intended only for her personal use, though that cocaine was in a brown paper bag from which she had removed the items given to the buyers. Overruling **People v. Cooper**, 337 Ill.App.3d 106, 785 N.E.2d 86 (1st Dist. 2003), the Supreme Court rejected the proposition that the examples of types of circumstantial evidence of intent to deliver listed in **People v. Robinson**, 167 Ill.2d 397, 657 N.E.2d 1020 (1995), are exclusive. The Court stated that, after viewing the evidence in this case in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant intended to deliver the substance found in the brown paper bag. Officer Olsen observed defendant standing alone behind a wrought iron fence at 2 a.m. On two separate occasions, an unknown man approached defendant, spoke briefly to her, and handed her money. Defendant then retrieved an unknown item from a brown paper bag that she kept a short distance from herself, handed the item to the man who had just given her money, and returned to her post behind the fence while the unknown man walked away. After detaining defendant, the police looked inside the brown paper bag and found a substance later identified as cocaine. These facts easily support an inference that defendant intended to deliver the remaining contents of the brown paper bag.

People v. Robinson, 167 Ill.2d 397, 657 N.E.2d 1020 (1995) The Supreme Court held that the evidence was insufficient to establish intent to deliver 2.2 grams of PCP and 2.8 grams of cocaine. Because it was plausible that such quantities were for defendant's personal use,

"additional circumstantial evidence of intent to deliver" was required. Whether the evidence is sufficient to prove intent to deliver "must be determined on a case-by-case basis." Several factors are probative of intent to deliver, including the quantity of drugs in the defendant's possession, whether that quantity is too large for personal consumption, the purity of the substance, whether weapons or large amounts of cash are present, whether the defendant has police scanners, beepers, cellular telephones or drug paraphernalia, and whether the substance is packaged in a manner consistent with its resale.

People v. Lewis, 83 Ill.2d 296, 415 N.E.2d 319 (1980) The defendant was charged with delivery of cannabis, and was found guilty of possession of cannabis with the intent to deliver. Defendant alleged that it was error to convict him of possession with intent to deliver since he was not charged with that offense. The Court held that the defendant was properly convicted of possession of cannabis with the intent to deliver based upon the information charging delivery; possession with intent to deliver is a lesser included offense of delivery.

Illinois Appellate Court

In re M.G., 2022 IL App (4th) 210679 Viewing the evidence in the light most favorable to the State, the minor was proved guilty of possession with intent to deliver cannabis. He possessed a total of 77 grams of cannabis, separated into 22 packages, each containing 3.5 grams. The total amount of the cannabis and the individual packaging support the conclusion that it was intended for delivery, not personal use.

People v. Starks, 2019 IL App (2d) 160871 Where the quantity of a seized substance could be consistent with personal use, additional evidence of intent to deliver is required to convict of possession with intent to deliver a controlled substance. Here, the substance was packaged in 20 individual baggies, defendant also possessed a box of sandwich bags and a weapon (a collapsible, metal baton), and defendant did not possess any paraphernalia for drug use. Taking that evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of possession of a controlled substance with intent to deliver had been proved beyond a reasonable doubt.

People v. Johnson, 2013 IL App (4th) 120162 Direct evidence of intent to deliver is rare and must usually be proved by circumstantial evidence. An intent to deliver as a mental state can be imputed from one offender to another where the State's theory of the case is one of accountability. However, where the State does not pursue an accountability theory in the trial court, it would violate defendant's due process right to argue in opposition to that theory for the Appellate Court to uphold a defendant's conviction on that theory on appeal. **People v. Millsap**, 189 Ill. 2d 155, 724 N.E.2d 942 (2000).

The State's evidence did not support the inference that defendant shared the driver's intent to deliver as a principal. Defendant agreed to drive to Chicago knowing that the driver intended to purchase heroin, and actually possessed some of the heroin for his personal use. But the female passenger's testimony that the driver intended to take the heroin and sell it on their return to St. Louis was uncontradicted. The driver's intent to deliver could not be imputed to defendant because the State did not pursue that theory at trial and the jury was not instructed on that theory.

"Deliver" means more than transporting a controlled substance from one place to another. At the very least, it requires an attempt to transfer possession of the substance. The Appellate Court therefore rejected the State's argument that the defendant possessed the

heroin with intent to deliver because he intended to transport the heroin from Chicago to St. Louis.

The Appellate Court reduced defendant's conviction from possession with intent to deliver to simple possession, vacated defendant's sentence, and remanded for a new sentencing hearing.

People v. Clinton, 397 Ill.App.3d 215, 922 N.E.2d 1118 (1st Dist. 2010) Intent to deliver may be based solely on the possession of large quantities of a controlled substance. However, as the quantity of controlled substance in the defendant's possession decreases, these is a need for additional circumstantial evidence of intent to deliver. The evidence was insufficient to establish intent to deliver where the defendant possessed 15 tinfoil packets, at least one of which contained heroin, and $40 in cash. Defendant did not possess weapons, a cell phone, a pager, or drug paraphernalia. In addition, he was not observed engaging in any transactions, and police did not receive any tips concerning suspected drug activity. Neither officer testified that the amount recovered was inconsistent with personal use, and there was no testimony regarding the street value of the heroin or that the substance was packaged as if for sale. Finally, while the officers stated that they were patrolling a high crime area, neither stated that the location was known for ongoing drug activity. Even considered most favorably to the prosecution, the evidence was insufficient to prove intent to deliver beyond a reasonable doubt.

Defendant's conviction for possession of more than one but less than 15 grams of heroin with intent to deliver was reduced to unlawful possession of less than 15 grams of a substance containing heroin, and the cause was remanded for a new sentencing hearing.

People v. Hendricks, 325 Ill.App.3d 1097, 759 N.E.2d 52 (1st Dist. 2001) The evidence was insufficient to show that defendant possessed cocaine with intent to deliver where the substance was contained in a doll in a package that was addressed to the defendant and which was delivered after being opened by postal inspectors. Police did not discover guns, ammunition, scales, telephone beepers, large amounts of money or drug records in the defendant's residence, the cocaine was packaged in a single container rather than in many small packets, and there was no evidence concerning purity. In addition, there was no evidence that defendant had any knowledge of local drug trafficking or involvement with drugs. Furthermore, the State conceded that the quantity of cocaine was consistent with personal use. Although $800 was recovered from defendant's bedroom, the money was not commingled with the cocaine and "must be considered in light of the fact that defendant worked, shared her home with her mother and supported several children."

People v. Brown & Cooper, 277 Ill.App.3d 989, 661 N.E.2d 533 (1st Dist. 1996) The evidence was sufficient to show defendant intended to participate in the delivery of drugs. Expert testimony showed that the drugs in defendant's constructive possession were packaged for distribution and consisted of quantities greater than would be used for personal consumption.

People v. Beverly, 278 Ill.App.3d 794, 663 N.E.2d 1061 (4th Dist. 1996) The Court found that the evidence was sufficient to establish intent to deliver. Defendant possessed .9 grams of cocaine packaged in six small plastic bags, and he had various amounts of currency in his clothing. Although the amount of the substance in defendant's possession was consistent with personal use, intent to deliver was proven because the substance was packaged in multiple individual doses, expert testimony indicated that the drugs were packaged for sale,

and defendant had a large amount of cash in his possession.

People v. Nixon, 278 Ill.App.3d 453, 663 N.E.2d 66 (3d Dist. 1996) Defendant's possession of 6.6 grams of cocaine was insufficient to prove intent to deliver. Where only a small quantity of substance or defendant's possession of a weapon, a large amount of cash, a police scanner, a beeper, a cellular telephone or drug paraphernalia. In addition, there was no evidence that police had received anonymous tips concerning defendant's sale of drugs or observed a large number of individuals entering his residence at unusual times. Finally, the substance was packaged in only four bags, a number consistent with possession for personal consumption.

People v. Thomas, 261 Ill.App.3d 366, 633 N.E.2d 839 (1st Dist. 1994) The evidence was insufficient to establish that defendant possessed cocaine with intent to deliver. Though defendant was filling small packets with white powder from a tray and had a shotgun beside him, he did not possess a combination of narcotics or a significant amount of money, and there were no scales nearby. Moreover, the State failed to show that the defendant either owned the shotgun or had handled it. Thus, the only relevant evidence was defendant's possession of 5.5 grams of cocaine, a quantity that is clearly insufficient to establish intent to deliver.

People v. Hodge, 250 Ill.App.3d 736, 620 N.E.2d 651 (5th Dist. 1993) The Court found that the evidence was insufficient to establish intent to deliver cocaine. Though the quantity of cocaine was more than would be intended for personal use, the substance was discovered next to a handgun, and defendants had more than $2000 in their possession (mostly in $20 bills), neither defendant possessed any of the paraphernalia (such as scales or plastic bags) normally associated with dealing. In addition, the cocaine was not packaged in a way that would facilitate its sale, and there was no evidence that defendant had engaged in any drug sales.

People v. Brown, 232 Ill.App.3d 885, 598 N.E.2d 948 (1st Dist. 1992) At defendant's trial for possession of cocaine with intent to deliver, the State called a police officer to testify as an expert witness on the value of the substances found in defendant's possession and to describe common practices, habits or characteristics of drug sellers. The officer testified that dealers frequently carry guns to protect their large profits, commingle cash and drugs, and carry cocaine packages of greater than one gram. The officer also testified that dealers do not usually carry drug paraphernalia used to ingest cocaine. The Court found this evidence was improperly admitted because its probative value on the issue of street value was outweighed by the danger of unfair prejudice, and because it amounted to "profile testimony which was not connected to the defendant or the circumstances surrounding his arrest."

People v. Love, 209 Ill.App.3d 816, 568 N.E.2d 192 (3d Dist. 1991) At defendant's trial for possession of cocaine with intent to deliver, evidence was presented that defendant and a co-defendant were sitting in the back seat of a car and that a bottle containing several small plastic bags of cocaine was found on the rear floorboard. The trial court excluded evidence that the defendant and co-defendant had only about $2.00 in their possession at the time of arrest, while the two occupants of the front seat had about $365 between them. The Appellate Court held that the trial court's ruling was erroneous. Although there was no fingerprint evidence to connect any of the passengers to either the bottle or any of the small bags, a police officer testified that the bottle was three-quarters full of cocaine. Therefore, it could be inferred that additional bags had been in the bottle but had been used or delivered prior to

the arrest. Given the lack of direct evidence of possession, the fact that defendant had relatively little money while the front seat passengers had $365 would have supported defendant's theory that he was not involved in any sale or delivery and did not possess the cocaine.

People v. McLemore, 203 Ill.App.3d 1052, 561 N.E.2d 465 (5th Dist. 1990) The Court held that the evidence did not prove "intent to deliver." In closing argument, the prosecutor stated that the amount of cocaine possessed by defendant — 15 packets or 3.3 grams — was more than could be used for personal consumption, particularly between the time of the arrest (noon) and 6 p.m., when defendant claimed she was to enter a penal institution. However, no evidence had been introduced to support the prosecutor's statement that the amount of cocaine was greater than would be used for personal consumption. The Court discussed other cases in which the amount of drugs, along with money or drug paraphernalia, allowed an inference of an intent to deliver, and found that the amounts in those cases were "significantly greater than are involved here."

People v. Carrasquilla, 167 Ill.App.3d 1069, 522 N.E.2d 139 (1st Dist. 1988) To sustain a conviction for possession of controlled substances with intent to deliver under the doctrine of constructive possession, the State must prove the defendant had knowledge of the substances, they were within his immediate and exclusive control, and he had intent to deliver. Here, intent to deliver could be inferred from the amount of cocaine seized; 3,888 grams of cocaine was far in excess of what could be intended for personal use.

People v. Whitfield, 140 Ill.App.3d 433, 488 N.E.2d 1087 (5th Dist. 1986) The defendant, a prison guard, was found with 193 grams of cannabis cigarettes on his person and 645 grams of cannabis cigarettes in his car trunk in the prison parking lot. All of the cigarettes were wrapped in the same manner. This evidence was sufficient to prove intent to deliver all of the cannabis.

People v. Brown, 134 Ill.App.3d 951, 481 N.E.2d 981 (4th Dist. 1985) The court held that the offense of possession with intent to deliver less than 10 grams of cocaine (Ch. 56½, ¶1401(c)) is not a lesser included offense of calculated criminal drug conspiracy (Ch. 56½, ¶1405), since the possession of *less than* 10 grams of cocaine is not an element of such conspiracy.

People v. Kline, 41 Ill.App.3d 261, 354 N.E.2d 46 (2d Dist. 1976) If a defendant possesses a quantity of controlled substances (in this case more than 500 grams of cannabis) that is "large enough to distribute and in excess of any amount which could be normally intended for personal use," the trier of fact may infer that the possession was with intent to deliver. See also, **People v. Munoz**, 103 Ill.App.3d 1080, 432 N.E.2d 370 (3d Dist. 1982) (250 grams of cocaine); **People v. Birge**, 137 Ill.App.3d 781, 485 N.E.2d 37 (2d Dist. 1985) (22,650 grams of cannabis); **People v. Knight**, 133 Ill.App.3d 248, 478 N.E.2d 1082 (1st Dist. 1985) (364 grams of cannabis, 638 grams of PCP); **People v. Schaefer**, 133 Ill.App.3d 697, 479 N.E.2d 428 (2d Dist. 1985) (discussion of factors which support a finding of intent to deliver).

§13-3(d)
Manufacturing and Delivery

Illinois Supreme Court

People v. Ortiz, 196 Ill.2d 236, 752 N.E.2d 410 (2001) To sustain a charge of controlled substances trafficking, the State must prove that defendant knowingly brought controlled substances into Illinois with the purpose or intent to deliver. The court noted that under **U.S. v. Resio-Trejo**, 45 F.3d 907 (5th Cir. 1995) and similar authority, mere control of a vehicle does not establish that the driver knew of drugs hidden in secret compartments of the vehicle. Without expressly adopting the same rule, the court stated that it "would be dubious of a result based solely on a presumption of knowledge in . . . a case where drugs were found in a secret compartment of a trailer of a vehicle driven for hire, which the driver did not own." The court rejected the State's argument that there was sufficient circumstantial evidence to establish that defendant knew cocaine was hidden in the trailer. The court noted several pieces of uncontradicted evidence in defendant's favor, that defendant consented to a search after being told he was free to leave, and the existence of reasonable explanations for other allegedly incriminating pieces of evidence.

People v. Frieberg, 147 Ill.2d 326, 589 N.E.2d 508 (1992) Defendant was charged with "controlled substance trafficking" (Ch. 56½, ¶1401.1(a)) and possession of a controlled substance with intent to deliver (Ch. 56½, ¶1401). Both offenses arose from the same conduct. Following trial, defendant was found guilty of the trafficking offense but not guilty of possession with intent to deliver. Controlled substance trafficking is committed when a person "[*k*]*nowingly* brings . . . into this State *for the purpose* of manufacture or *delivery or with the intent to deliver* a controlled or counterfeit substance." (Ch. 56½, ¶1401.1(a)). Section 1401 provides that it is unlawful for a person to "[k]*nowingly* . . . deliver, or *possess with intent to* . . . *deliver*, a controlled or counterfeit substance." The Supreme Court held that "for the purpose of" delivery and "with the intent to" deliver are alternative rather than synonymous elements. Because a person may bring controlled substances into the state "for the purpose of" delivery without having the "intent to deliver" them, a conviction for controlled substance trafficking is valid despite an acquittal of possession with intent to deliver.

Illinois Appellate Court

People v. Coger, 2019 IL App (1st) 163250 Separate convictions for delivery of heroin and delivery of cocaine were improper where both convictions were based on a single delivery of three packets which each tested positive for a mixture of the two drugs, disagreeing with **People v. Bui**, 381 Ill. App. 3d 397 (1st Dist. 2008). A drug user could not separate the substance into two separate drugs for separate use, so it would not further the purpose of the statute to punish defendant for two separate offenses. Further, the statute criminalizes possession of a "substance containing" certain illegal drugs not each of the ingredients within a single substance. And, there was no evidence that the defendant knew the substance contained more than one drug. Accordingly, one of defendant's delivery convictions was vacated.

People v. Williams, 2014 IL App (3rd) 120824 Defendant pled guilty to unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing

cap of 25 years' imprisonment. The Appellate Court concluded that the trial judge's admonishment was in error and prejudiced defendant.

Several statutes arguably applied to the maximum sentence. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a person convicted of a second or subsequent offense under the Controlled Substances Act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

The Appellate Court found that the above statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1). In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

Where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. Because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Although the parties agreed to a sentencing cap that was less than the 30-year maximum sentence which actually applied, defendant was prejudiced by the trial court's erroneous admonishments that the maximum sentence was 60 years where defendant alleged that he had relied on the faulty admonishments in deciding to accept the plea bargain.

People v. Yoselowitz, 2011 IL App (4th) 100764 Neither the proportionate penalties clause of the Illinois Constitution nor equal protection principles were violated by 720 ILCS 550/5(g), which provides a Class X sentence for the manufacture, delivery, or possession of more than 5000 grams of cannabis with intent to deliver or manufacture.

The court acknowledged recent studies showing that cannabis is neither addictive nor likely to lead to great bodily harm, but found that the legislature imposed the Class X sentencing provision to combat illegal drug use by directing law enforcement efforts to commercial traffickers and large scale purveyors of illegal substances. The court found that such legislative intent constituted a rational basis for the Class X sentencing scheme, and that imposing a Class X sentence on purveyors of large quantities of marijuana was not shocking to the moral sense of the community. The court also noted that defendant's arguments concerning the effects of marijuana use should be addressed to the legislature rather than the courts.

People v. Pehrson, 190 Ill.App.3d 928, 547 N.E.2d 613 (2d Dist. 1989) The Court upheld Ch. 56½, ¶1401(b)(2), which makes delivery of 1 to 15 grams of cocaine a Class 1 felony, over the contention that the statute violates due process because delivery of the same amount of heroin (up to 10 grams) is a Class 2 felony.

People v. Wells, 184 Ill.App.3d 925, 540 N.E.2d 1070 (1st Dist. 1989) Two counts of delivery of controlled substances were properly joined. Although the offenses occurred two weeks apart, both were part of the same comprehensive transaction. The evidence showed an overall plan to furnish a continuing supply of cocaine to the buyer, future sales depended on the quality of cocaine supplied in the first delivery, and both deliveries occurred in the same place and at the same time of day.

§13-4
Enhancements

§13-4(a)
Generally

United States Supreme Court

Burgess v. United States, 553 U.S. 124, 128 S.Ct. 1572, 170 L.Ed.2d 478 (2008) The Federal Controlled Substances Act doubles the mandatory minimum sentence for certain drug offenses if the defendant has been previously convicted of a "felony drug offense." The court held that a state drug conviction constitutes a "felony drug offense" if it was punishable by a prison sentence in excess of one year, even if the offense was classified as a misdemeanor by state law.

Smith v. U.S., 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) Offering to trade a weapon for cocaine constitutes "use" of a weapon "during and in relation to" a drug crime, and triggers a mandatory 30-year sentence under federal law. Congress did not limit the mandatory sentence to situations in which a firearm is used as a weapon. Rather use of a weapon occurs "in relation to" an offense when it has some "purpose or effect" with respect to the crime.

Illinois Appellate Court

People v. Johnson, 174 Ill.App.3d 726, 528 N.E.2d 1356 (4th Dist. 1988) Proof of a defendant's prior conviction is an essential element of the offense of unlawful possession of a hypodermic syringe or needle (Ch. 38, §§22-50, 22-53). The first offense for such unlawful possession is a Class A misdemeanor, while subsequent offenses are Class 4 felonies. Thus, to convict a defendant of a felony based upon a subsequent offense, the prior conviction must be proved at trial.

§13-4(b)
Quantity

Illinois Supreme Court

People v. Jones, 174 Ill.2d 427, 675 N.E.2d 99 (1996) Defendant was convicted of possession, with intent to deliver, of more than one but less than 15 grams of a substance containing cocaine. When he was arrested defendant had five packets of a white rocky substance which weighed 1.4 grams. The State tested only two of the packets, which had a combined weight of .59 grams. Defendant stipulated to the result of the laboratory test, which indicated that the two tested packets contained cocaine. However, the remaining three packets were not tested and were not the subject of a stipulation. The Supreme Court held that the State failed to prove defendant possessed more than one gram of a substance containing cocaine. Where

a defendant is charged with possession of a specified amount of a controlled substance, and a lesser included offense is available for possession of a smaller quantity, the weight of the substance is an essential element that must be proved beyond a reasonable doubt. Where a substance is packaged in separate containers, a sample from each container must be tested before the trier of fact can find that a controlled substance was present in that container. The Court recognized that where the defendant is in possession of tablets or capsules having the "same size, shape, color and density," a random sample may provide a basis to infer that all of the tablets contain the same substance. However, this rule is unavailable when the substance is merely "similar" and not identical in every respect.

Illinois Appellate Court

People v. Holliday, 2019 IL App (3d) 160315 Upon recovering three separate bags of a plant substance, an officer combined them into a single bag. Subsequent lab testing determined that the commingled substance weighed 1048 grams and was positive for the presence of cannabis.

When separate substances are commingled before testing, there is no way to know how many of the separate substances contained an illegal substance. And, in the absence of evidence that the entirety of the substance was homogenous, the trier of fact cannot infer that all of the bags contained the same substance. Accordingly, the State's evidence established only that defendant possessed an unspecified amount of cannabis. His conviction of possession with intent to deliver more than 500 but less than 2000 grams of a substances containing cannabis was reduced to the civil law violation of possession of not more than 10 grams of a substance containing cannabis.

People v. Sturgeon, 2019 IL App (4th) 170035 In a prosecution for possession of a specific quantity of methamphetamine within 1000' of a school, a witness's testimony that he did "not necessarily calibrate[ ]" the scale before weighing the substance but that he did "check[ ] it against the known weights" was adequate to support a guilty verdict. Another witness, a forensic scientist, testified to using a similar procedure to check that her scale was weighing properly. Considered in the light most favorable to the prosecution, a rational jury could find that the weight of the substance was proved beyond a reasonable doubt.

As to the element that the possession was within 1000' of a school, the State should have introduced more evidence than a police officer's testimony that he "learned" defendant's residence where the drugs were found was approximately 609 feet from the school. For instance, the officer could have testified to the method he used to determine the distance. But defense counsel did not cross-examine the witness on the matter or argue in closing that the proof of distance was inadequate, and taking the evidence in the light most favorable to the State, defendant was proved guilty beyond a reasonable doubt. Defense counsel was not ineffective for pursuing the all-or-nothing strategy that defendant did not possess the methamphetamine.

People v. Miramontes, 2018 IL App (1st) 160410 Counsel's stipulation to the quantity of methamphetamine constituted ineffective assistance where three separate bags of a whitish substance had been recovered by the police but were combined before any of the bags could be tested independently. Relying on **People v. Coleman**, 2015 IL App (4th) 131045, the Court concluded that it could only speculate about whether all three of the bags contained methamphetamine prior to combining them. Because defendant may have been convicted of

possession of a lesser quantity had counsel not stipulated to the combined quantity, defendant was prejudiced, and the matter was reversed and remanded for a new trial.

People v. Coleman, 2015 IL App (4th) 131045 Where a defendant is charged with possessing a specific amount of an illegal drug and there is a lesser included offense involving possession of a smaller amount, the weight of the substance is an essential element of the offense and must be proven beyond a reasonable doubt. Thus, where the suspected contraband was seized in separate containers, the State can carry its burden concerning the aggregate weight only if it can show that each of the packages contained the controlled substance. Although random testing may suffice where contraband consists of identical items such as tablets, if loose powder is involved the State must test each of the separate containers in order to carry its burden.

People v. Yoselowitz, 2011 IL App (4th) 100764 Neither the proportionate penalties clause of the Illinois Constitution nor equal protection principles were violated by 720 ILCS 550/5(g), which provides a Class X sentence for the manufacture, delivery, or possession of more than 5000 grams of cannabis with intent to deliver or manufacture.

The court acknowledged recent studies showing that cannabis is neither addictive nor likely to lead to great bodily harm, but found that the legislature imposed the Class X sentencing provision to combat illegal drug use by directing law enforcement efforts to commercial traffickers and large scale purveyors of illegal substances. The court found that such legislative intent constituted a rational basis for the Class X sentencing scheme, and that imposing a Class X sentence on purveyors of large quantities of marijuana was not shocking to the moral sense of the community. The court also noted that defendant's arguments concerning the effects of marijuana use should be addressed to the legislature rather than the courts.

People v. Tilley, 2011 IL App (4th) 100105 When a defendant is charged with participation in the manufacture of a specific amount of a substance containing an illegal drug, and there is a lesser-included offense of a smaller amount, the weight of the seized substance is an essential element of the crime and must be proved beyond a reasonable doubt. While no court has defined what constitutes a single substance as opposed to multiple substances, courts have construed "substance" to include a mixture of different chemicals created by defendant. A byproduct of methamphetamine production can be considered a "substance" under the statute. **People v. McCarty**, 223 Ill.2d 109, 858 N.E.2d 15 (2006).

Defendant was charged with participating in the manufacture of between 100 and 400 grams of a substance containing methamphetamine. The police recovered a bag containing a substance weighing 391.1 grams of a substance that tested positive for methamphetamine. A witness described the substance as consisting of both white, chunky powder and black chunks.

The court refused defendant's request to reduce defendant's conviction to a lesser offense because the methamphetamine could have been attributed to one of these materials, but not the other, and the State failed to weigh the materials separately. The substance was a mixture created during the manufacturing process and was blended together in a single container when recovered. The court extrapolated from the requirement that the contents of separate containers must be tested separately, that the contents of one container may be considered one substance. The State is generally entitled to establish the mass of a controlled substance without altering its condition or removing possibly identifiable, distinct, licit materials. The court also considered that the various ways in which the parties and the

witness referred to the substance suggested that the black and white materials were less discrete than the defendant contended, allowing a reasonable trier of fact to find that the material was a single substance containing methamphetamine.

People v. Adair, 406 Ill.App.3d 133, 940 N.E.2d 292 (1st Dist. 2010) Defendant was convicted of possession of at least 15 but less than 200 pills of MDMA, and at least five but not more than 15 grams of methamphetamine. During a traffic stop of defendant's car, police seized a plastic bag containing 21 whole pills, a piece of a red pill, two chunks of green pills with a red crust, and red and orange powder. Of the 21 pills, three were yellow, four were lavender, six were orange with a "win" imprint, two were orange and shaped like the Superman logo, four were red with an unclear imprint, and two were red and shaped like the Superman logo. In addition, the bag contained red and orange powder.

A forensic scientist with the State police lab testified that the pills were soft and crumbled when touched. As the pills crumbled, the resulting powder mixed. The pills were touching each other in the bag and were covered with red powder. The chemist testified that collectively, the pills and powder weighed 6.4 grams.

The pills were not sufficiently homogenous to justify an inference that they were the same. Therefore, random testing of some of the substances would not have justified a conclusion that the entire 6.3 grams contained either methamphetamine or MDMA.

The chemist did not rely on random testing, however. Instead, she created what she deemed to be a "representative sample" by crushing a sample of each pill and adding powder from the bag. This "representative sample" tested positive for both methamphetamine and MDMA. This failed to produce a result which satisfied the reasonable doubt standard concerning possession of the charged quantity of either MDMA or methamphetamine. To determine whether each color and type of pill contained a controlled substance, the chemist would have been required to test each type. By combining samples from all of the pills and the loose powder, the chemist showed merely that at least at least some of the pills or powder contained some methamphetamine or MDMA.

The court rejected the argument that defendant could be convicted of the cumulative weight of the substances because all of the pills were covered by a red powder when seized. To sustain the convictions based on the red powder, the chemist would have been required to test the red powder to determine whether it contained both MDMA and methamphetamine. In the absence of such testing, it would be speculative to conclude that the red powder was a controlled substance.

Defendant's convictions were reduced to the lowest weight classification for each offense - possession of less than 15 pills of MDMA and possession of less than five grams of methamphetamine.

People v. Clinton, 397 Ill.App.3d 215, 922 N.E.2d 1118 (1st Dist. 2010) Where a defendant is charged with possession of a specific amount of an illegal drug with intent to deliver, and there is a lesser included offense for possession of a smaller amount, the weight of the substance is an essential element of the crime and must be proved beyond a reasonable doubt.

A chemist need not test every sample of a suspected controlled substance where the samples are sufficiently homogeneous to infer, beyond a reasonable doubt, that the untested samples are the same as those tested. Where the samples are not sufficiently homogeneous, however, a portion from each sample must be tested to determine whether each sample contains a controlled substance.

An example of a sufficiently homogeneous substance are identical tablets of the same size, diameter and roundness and with identical lettering, beveling and scoring. By contrast,

in view of the common use of look-alike substances, samples of white powder are not sufficiently homogeneous to justify testing only one sample.

Here, the chemist erred by combining several packets of white powder, weighing the combined substance, and then testing the combined substance to determine whether a controlled substance was present. Because it was impossible to tell whether each of the samples contained the controlled substance and the combined weight of all the samples was necessary to support a finding of possession of a controlled substance weighing more than one but less than 15 grams, the State failed to prove guilt beyond a reasonable doubt.

People v. Speed, 106 Ill.App.3d 890, 436 N.E.2d 712 (2d Dist. 1982) The defendant was convicted of unlawfully possessing more than 30 grams of cannabis (Ch. 56½, ¶704(d)). A forensic scientist testified that he weighed the substance on a scale that was accurate to within 1/100th of a gram, and found a total weight of 28.8 grams. However, a police officer testified that he took the substance to a drug store, where a pharmacist weighed the substance and reported that it weighed 35 grams. The Court held that the evidence was insufficient to prove that the cannabis weighed over 30 grams. The State's expert witness testified that the weight was less than 30 grams, and the contrary evidence was hearsay. The conviction was reduced.

§13-4(c)
Location

Illinois Supreme Court

People v. Newton, 2018 IL 122958 Section 407(b)(2) of the Controlled Substances Act enhances the penalty for delivering controlled substances within 1000 feet of a "church, synagogue, or other building, structure, or place used primarily for religious worship." Defendant alleged that the State failed to prove he delivered drugs within 1000 feet of a church because the State did not offer particularized evidence that the building was used for religious worship. Instead, the State relied on an officer's testimony that the building had a sign identifying it as a church, and that he had seen cars in its parking lot.

The Supreme Court interpreted the statute using the dictionary definition of "church," finding it to be a building used primarily for religious worship. It held that the State must prove that the building is used primarily for religious worship, but that "the legislature has already determined that a church or a synagogue meets that requirement." Thus, in this case, the State merely had to prove that the building could reasonably be identified as a "church." In light of the sign and the cars seen entering the parking lot, a rational trier of fact could find beyond a reasonable doubt that the building met the statutory definition of "church."

In dissent, Justice Burke, with Justice Neville, found that the majority's analysis read into the statute an unconstitutional mandatory rebuttable presumption, whereby if the State could show that a building had certain (undefined) traditional characteristics of a church, the burden shifted to the defendant to disprove that the building was used primarily for religious worship. Absent this presumption, the evidence was insufficient. The officer never verified that any of the people driving the cars entering the lot were using the building for religious worship, never spoke with a pastor or anyone else associated with the church, and never personally witnessed any religious ceremonies inside the building.

People v. Hardman, 2017 IL 121453 To prove that a delivery of a controlled substance took place within 1000 feet of a school under 720 ILCS 570/407(b), the State need not present

particularized evidence that a building is an "active" or "operational" school on the day of the offense. While the court has previously held that the State must prove the specific type of school alleged in the indictment meets the common law definition of a school, it has never required direct evidence of the school's functionality. In rejecting the defendant's argument that particularized evidence is necessary, the Supreme Court distinguished a series of Appellate Court cases requiring such evidence to prove the church element of Section 407(b), as the statutory language relating to churches does have a "use" requirement.

Viewing the evidence in the light most favorable to the State, the State proved the school element beyond a reasonable doubt. Two officers with several years' experience in the neighborhood identified the building in question as Ryerson Elementary School. Although the officers also testified that the building's name had since been changed to Laura Ward Elementary, the mere fact that a school underwent a name change at some point between the offense and trial did not undermine their identification of the building as a school given their experience with the neighborhood.

People v. Young, 2011 IL 111886 720 ILCS 570/407(b)(2) creates a Class 1 felony with a fine of up to $250,000 for committing certain controlled substance offenses "within 1,000 feet of the real property comprising any school." Defendant was charged with delivery of a controlled substance within 443 feet of the "High Mountain Church and Preschool," which was not described in the record other than by its name.

The Supreme Court reduced the conviction to simple delivery of a controlled substance, holding that the term "school" is limited to a "public or private elementary or secondary school, community college, or university." The court found that for purposes of the Controlled Substances Act, the term "school" has a settled meaning as "any public or private elementary or secondary school, community college, college or university." Although 720 ILCS 570/407(b)(2) does not contain a definition of the term "school," the court found an established meaning in long-standing Illinois precedent, the legislature's failure to adopt a contrary definition, the adoption of a similar construction in the Criminal Code, and the definition of the same term in other sections of the Controlled Substances Act. The court also stressed that the legislature has amended §407(b)(2) nearly a dozen times without adopting a different definition of the term "school."

Because the settled meaning of the term "school" does not include preschools, defendant could not be convicted of delivery of a controlled substance within 1,000 feet of such a school.

People v. Falbe et al., 189 Ill.2d 635, 727 N.E.2d 200 (2000) 720 ILCS 570/407(b)(1), which enhances the Class 1 felony of unlawful possession of cocaine with intent to deliver to a Class X felony where the offense occurred on a "public way" within 1,000 feet of a church, is neither void for vagueness nor a violation of the "establishment of religion" clause. The court reversed the trial judge's finding that §407(b)(1) was unconstitutional as applied to defendants who were followed by police from their house until they were within 1,000 feet of a church.

The statute was reasonably designed to prohibit the presence of drug traffickers, and thus decrease the number of drug offenses, in areas where inhabitants are particularly vulnerable to criminal activity and "less able" to protect themselves. The court held that the legislature acted rationally by prohibiting *all* possession and manufacturing within the protected area, because "it follows logically that the presence of drug traffickers and quantities of drugs in these areas is likely to result in an increase of drug transactions with all their attendant evils." In addition, the offense does not require intent to consummate a

drug transaction within the protected zone, and is complete whenever controlled substances are possessed or manufactured within that zone.

Whether the establishment clause has been violated is determined by the three-part test adopted in **Lemon v. Kurtzman**, 403 U.S. 602 (1971), under which a statute satisfies the establishment clause where its legislative purpose is secular, its primary effect neither advances nor inhibits religion, and it does not foster excessive governmental "entanglement with religion." The **Lemon** test was satisfied here: (1) the purpose of the enhancement statute was secular (to protect "particularly vulnerable" segments of society from narcotics activity), (2) the primary effect of the statute is to prevent drug trafficking rather than to advance religion, and (3) defendants stipulated they were within 1,000 feet of a church, making it unnecessary to consider whether the definition of a "place of worship" was so uncertain as to create "excessive governmental entanglements between church and state." See also, **People v. Daniels**, 307 Ill.App.3d 917, 718 N.E.2d 1064 (2d Dist. 1999) (720 ILCS 570/407(b), which enhances penalty for delivery of a controlled substance within 1,000 feet of real property comprising a church, does not require knowledge by defendant that the delivery is within the protected zone; the only *scienter* requirement is that the defendant knowingly delivered a controlled substance); **People v. Dexter**, 328 Ill.App.3d 583, 768 N.E.2d 753 (2d Dist. 2002) (to be a "public way" for purposes of 720 ILCS 570/407(b)(1), the offense must occur on a "thoroughfare, . . . path, road [or] street . . . that is "controlled and maintained by governmental authorities for general use"; a "private way" does not become a "public way" merely because it is accessible to the public (overruling **People v. Rodriguez**, 276 Ill.App.3d 33, 657 N.E.2d 699 (2d Dist. 1995)).

People v. Farmer, Myers, Henry, & Flores, 165 Ill.2d 194, 650 N.E.2d 1006 (1995) The court held that the statute creating the offense of possessing contraband in a penal institution (720 ILCS 5/31A-1.1) is not unconstitutional. The Court held that §5/31A-1.1 does not create an absolute liability offense and that a mental state requirement of knowledge should be implied.

Illinois Appellate Court

People v. Muffick, 2019 IL App (5th) 160388 Defendant's conviction for aggravated participation in methamphetamine manufacturing was reduced to simple participation in methamphetamine manufacturing because the State failed to prove beyond a reasonable doubt that either of two churches within 1000' of the location of the offense was operating primarily as a place of worship on the date of the offense. An officer's testimony merely referring to a location as a "church," without more, is inadequate to establish that the purported church was operating as a "place of worship." Further, although not raised and not determinative of the outcome here, the Appellate Court also noted that the trial court had erred in using the word "church" in the jury instructions where the statute requires that the offense occur within 1000' of a "place of worship or parsonage;" the latter creates a higher burden than when a statute uses the term "church."

People v. Jones, 2019 IL App (3d) 160268 Statutory amendment reducing distance for sentencing enhancement for unlawful delivery of a controlled substance from within 1000 feet of a church to within 500 feet of a church is not retroactive [705 ILCS 570/407(b)(1)]. Defendant's offense was committed in 2011, and he was sentenced in 2016. The statute in question was amended in 2018. Because the proceedings below had concluded before the amendment took effect, retroactive application was precluded.

People v. Holliday, 2019 IL App (3d) 160315 Upon recovering three separate bags of a plant substance, an officer combined them into a single bag. Subsequent lab testing determined that the commingled substance weighed 1048 grams and was positive for the presence of cannabis.

When separate substances are commingled before testing, there is no way to know how many of the separate substances contained an illegal substance. And, in the absence of evidence that the entirety of the substance was homogenous, the trier of fact cannot infer that all of the bags contained the same substance. Accordingly, the State's evidence established only that defendant possessed an unspecified amount of cannabis. His conviction of possession with intent to deliver more than 500 but less than 2000 grams of a substances containing cannabis was reduced to the civil law violation of possession of not more than 10 grams of a substance containing cannabis.

People v. Sturgeon, 2019 IL App (4th) 170035 In a prosecution for possession of a specific quantity of methamphetamine within 1000' of a school, a witness's testimony that he did "not necessarily calibrate[ ]" the scale before weighing the substance but that he did "check[ ] it against the known weights" was adequate to support a guilty verdict. Another witness, a forensic scientist, testified to using a similar procedure to check that her scale was weighing properly. Considered in the light most favorable to the prosecution, a rational jury could find that the weight of the substance was proved beyond a reasonable doubt.

As to the element that the possession was within 1000' of a school, the State should have introduced more evidence than a police officer's testimony that he "learned" defendant's residence where the drugs were found was approximately 609 feet from the school. For instance, the officer could have testified to the method he used to determine the distance. But defense counsel did not cross-examine the witness on the matter or argue in closing that the proof of distance was inadequate, and taking the evidence in the light most favorable to the State, defendant was proved guilty beyond a reasonable doubt. Defense counsel was not ineffective for pursuing the all-or-nothing strategy that defendant did not possess the methamphetamine.

People v. Davis, 2016 IL App (1st) 142414 The State failed to prove that the delivery of controlled substances occurred within 1000 feet of a school. 720 ILCS 570/407(b)(2). The evidence showed that defendant sold heroin to an undercover officer at an alley behind a gas station. The parties stipulated that an investigator measured the distance from the gas station to a high school as 822 feet. There was no evidence as to precisely where in the alley the sale took place or where in the gas station the investigator made his measurement from.

The court held that in order to establish that a drug transaction took place within 1000 feet of a school, the State must present evidence of the distance from the actual site of the transaction to the school. Here the evidence failed to show where precisely the transaction took place in the alley. And there was no evidence where precisely in the gas station the technician took his measurements. The State thus did not meet its burden.

Although the investigator's evidence was presented by stipulation, that did not remedy the shortcomings in the proof. Stipulations are given their natural probative effect and do not include matters that are not necessarily implicated by the stipulation. Here the stipulation only showed that the measurement took place from some point in the gas station and did not show that the measurement was from the actual site of the transaction in the alley behind the station.

The court reduced the conviction to delivery of a controlled substance and remanded for resentencing.

People v. Toliver, 2016 IL App (1st) 141064 A conviction for possession of more than one but less than 15 grams of heroin with intent to deliver is elevated from a Class 1 to a Class X felony if the offense occurs within 1000 feet of a school. 720 ILCS 570/401(c)(1), 407(b)(1). The court concluded that the State need not prove that a building was operating as a "school" on the date of the offense in order for the enhancement to apply.

Thus, the enhancement applied where defendant was convicted of possession with intent to deliver within 1000 feet of a school building which had closed more than a year earlier. The court noted that §407(c) provides that "the time of day, time of year and whether classes were currently in session at the time of the offense is irrelevant." The court also noted that it is reasonable to infer that although schools are not in session during summer vacations and on weekends, the buildings are still "schools" at which children might congregate.

The court also noted that the closed school building was owned and maintained by the Chicago Public School system, had the purpose, design, and site characteristics of a school, and according to two State's witnesses was recognized as a school within the surrounding neighborhood. "Whether closed to students, temporarily or permanently, the structure still exists as a school building to draw neighborhood children to its premises."

The court also noted that at trial defense counsel stipulated that the arrest occurred within 1000 feet of a school.

Defendant's conviction was affirmed.

People v. Sims, 2014 IL App (4th) 130568 Defendant was convicted of unlawful delivery of a controlled substance within 1000 feet of a church, and claimed that the evidence was insufficient to establish that the building in question was being used as a church at the time of the offense. The Appellate Court rejected this argument and affirmed the convictions.

Noting a conflict in Appellate Court authority, the Court elected to follow **People v. Foster**, 354 Ill. App. 3d 564, 821 N.E.2d 733 (1st Dist. 2004), which held that a police officer's reference to a building by a proper name which includes the word "church" is sufficient to prove beyond a reasonable doubt that the building was used primarily for religious worship on the date of the offense. A police officer testified that he had been an officer for 10 years and had been assigned to the narcotics unit for the past five-and-one-half years, and that the building in question had been a church for as long as he could remember including at the time of the offenses. Although the officer gave no basis for his claim that the building was being used as a church on the dates in question, the defense waived any objection by failing to raise it at trial. The lack of a foundational objection does not relieve the State from its duty to satisfy the reasonable doubt standard, because testimony might be so weak in its foundation that it is incapable of satisfying the reasonable doubt standard. Generally, however, the lack of a foundational objection means that the evidence becomes part of the record and may be given whatever weight it is worth.

The court concluded that it was reasonable to infer that an officer who had been a member of the narcotics unit for five-and-one-half years would be familiar with a town the size of Bloomington, especially where the officer worked with confidential sources and "evidently did not spend all his time behind a desk." The court also inferred that the officer likely spent a lot of the time doing controlled purchases and surveillance, and therefore spent a lot of time on the streets. Finally, a narcotics officer could be expected to be interested in whether and how various buildings were being used. Considering the evidence in the light most favorable to the prosecution, the court concluded that a reasonable trier of fact could have inferred that the officer's testimony provided a basis to believe that the building was being used for purposes of worship on the dates of the offenses.

Defendant's convictions were affirmed.

People v. Boykin, 2013 IL App (1st) 112696 Delivery of a controlled substance is enhanced to a Class 1 from a Class 2 felony if the offense occurs "within 1,000 feet of the real property comprising any school." 720 ILCS 570/407(b)(2). The Controlled Substances Act does not define the term "school," but the Supreme Court has determined that the term's settled meaning is "any public or private elementary or secondary school, community college, college or university."

At a trial for delivery within 1,000 feet of a school, police officers testified that the offense occurred near a school named Our Lady of Peace.

The Appellate Court found this evidence insufficient to prove the enhancement and reduced the conviction to simple delivery. The evidence was that a sign posted at the building identified it as "Our Lady of Peace." There was no evidence showing that the officers had personal knowledge of the operation of the building, or evidence from which it could be inferred that they had personal knowledge that the school was in operation on the date of the offense. The only evidence that the building's name included the word "school" consisted of an officer's affirmative response to a leading question about whether the officer was referring to "Our Lady of Peace school."

People v. Ortiz, 2012 IL App (2d) 101261 Delivery of 1 gram or more but less than 15 grams of any substance containing cocaine is a Class X felony rather than a Class 1 felony if the violation occurs "within 1000 feet of the real property comprising any church, synagogue, or other building, structure or place used primarily for religious worship." 720 ILCS 570/401(c)(2); 720 ILCS 570/407(b)(1).

A police officer testified that he measured the distance from the location where defendant delivered cocaine to the Emmanuel Baptist Church and the distance measured 705 feet. However, he did not testify to the date on which he conducted the measurement. Photographs of the building were also introduced, but there was no evidence presented to establish when they were taken. No witness testified that the photographs accurately depicted the building as it appeared on the date of the offense. Therefore, the State failed to prove that the building was primarily used for religious worship on the date of the offense.

The Appellate Court reversed defendant's conviction for delivery of a controlled substance within 1000 feet of a church, and remanded for sentencing on defendant's conviction for delivery.

People v. Sparks, 335 Ill.App.3d 249, 780 N.E.2d 781 (2d Dist. 2002) For purposes of 720 ILCS 570/407(b)(2), which prohibits the unlawful delivery of a controlled substance within 1,000 feet of a church, synagogue or other building, structure, or place used primarily for religious worship," the term "church" refers to "a place used primarily for religious worship." The court concluded that a chapel within the Salvation Army Community Center qualified as a "church," despite the fact it was only one part of a building that was used for numerous non-religious activities, where the chapel was used exclusively for weekly religious services that were similar to those conducted in Methodist churches. Because "the sole purpose of the chapel was to conduct religious services," a reasonable jury could have found that the chapel was a "church." In determining whether a delivery occurred within 1,000 feet of a "church," the distance between the site of the transaction and the "church" should be measured by a straight line, even if that line crosses buildings and could not be transversed on foot. Where the straight line distance between the site of the transaction and the Salvation Army Building was less than 1,000 feet, defendant was properly convicted of the

enhanced offense although a pedestrian walking from the transaction to the church would have been required to go more than 1,000 feet.

People v. Chrisman & Barbic, 334 Ill.App.3d 1098, 779 N.E.2d 922 (5th Dist. 2002) Under the rationale of **People v. Carillo**, 323 Ill.App.3d 367, 751 N.E.2d 1243 (5th Dist. 2001), the defendants did not commit the offense of bringing contraband into a penal institution by "knowingly . . . plac[ing] an item of contraband in such proximity to a penal institution as to give an inmate access to the contraband" (720 ILCS 5/31A-1.1(a)(3)). While picking up a friend who was being released from prison, defendants parked their locked van in a lot designated by prison officials for visitors' vehicles. The car contained an opened bottle of rum and a small amount of marijuana. The court rejected the argument that because prison officials allowed inmate work crews to clean the parking lot, the items were "accessible" to inmates in violation of §31A-1.1(a)(3). Because the lot was in view of several guard towers, inmates worked under supervision, the van was locked and could not have been entered except by committing a criminal offense, and any inmates allowed in the parking lot would likely enjoy "a very high level of official confidence," inmates could not be said to have had "access" to the contraband.

People v. Carillo, 323 Ill.App.3d 367, 751 N.E.2d 1243 (5th Dist. 2001) 720 ILCS 5/31A-1.1(a)(1), which prohibits knowingly bringing contraband into a penal institution, was intended to exclude contraband from areas of prisons that are related to inmate confinement. In order to violate the statute, the defendant must attempt to take contraband "through a door or gate into areas where security and safety are a concern." (Overruling **People v. Turnbeaugh**, 116 Ill.App.3d 199, 451 N.E.2d 1016 (5th Dist. 1983)). The court found that it erred in **Turnbeaugh** by equating the act of bringing contraband onto prison grounds with bringing it into the prison itself. Given that the General Assembly has drastically expanded the list of contraband, the court concluded that adhering to **Turnbeaugh** would create constitutional questions of notice because "[f]ew people with common intelligence would know that driving onto a visitor's parking with items that are legal to possess outside of a jail or prison violates a law that prohibits 'bringing contraband into a penal institution.'"

People v. Jones, 288 Ill.App.3d 293, 681 N.E.2d 537 (1st Dist. 1997) An essential element of an offense under 720 ILCS 570/407(b)(2), which enhances certain narcotic crimes if they occur "on the real property comprising any school . . . public housing or public park or on the public way within 1,000 feet of the real property comprising any school . . . public housing . . . or public park," is that the crime occurred "on a public way" and not merely within 1,000 feet of the subject property. Where defendant was charged only with having committed drug offenses "within 1,000 feet of the real property" managed by a public housing authority, and not on "a public way" within 1,000 feet of such property, the information was subject to dismissal. See also, **People v. Carter**, 297 Ill. App.3d 1028, 697 N. E.2d 895 (1st Dist. 1998).

People v. Moss, 274 Ill.App.3d 77, 654 N.E.2d 248 (5th Dist. 1995) The Court held that a person on electronic home detention through the Department of Corrections is "committed" to DOC for purposes of the Criminal Code. In this case, the defendant who was on electronic home detention was properly convicted of unlawful possession of cocaine in a penal institution where he brought cocaine from his house to sell in a neighbor's driveway.

People v. Goldstein, 204 Ill.App.3d 1041, 562 N.E.2d 1183 (5th Dist. 1990) The Court held that the defendant was properly sentenced for the enhanced offense of delivery of controlled

substances on "school" property, under Ch. 56½, ¶1407(b)(2), for delivering the substances in a dormitory room on a State university campus. The Court held that the language "any school" includes a "public or private university" and is not limited to grade schools and high schools.

§13-5
Methamphetamine Offenses

Illinois Supreme Court

People v. Stoffel, 239 Ill.2d 314, 941 N.E.2d 147 (2010) Under **People v. McCarty**, 223 Ill.2d 109, 858 N.E.2d 15 (2006), the waste product created in the process of manufacturing methamphetamine should be included when calculating the weight of the substance for purposes of determining the class of the offense.

People v. Davison, 233 Ill.2d 30, 906 N.E.2d 545 (2009) For purposes of 720 ILCS 5/20.5-6(a), which creates a Class 1 felony for possessing, manufacturing or transporting any "poisonous gas" with the intent to use the substance to commit a felony, the phrase "poisonous gas" includes any gas that in "suitable quantities has properties harmful or fatal to an organism when it is brought into contact with or absorbed by the organism." The court rejected the argument that poisonous gases are limited to "poison gases which are designed to kill, injury, or disable by inhalation or contact," (i.e., substances used in chemical warfare). The court concluded that for purposes of §20.5-6(a), anhydrous ammonia is a "poisonous gas." Thus, defendant could be convicted of violating §20.5-6 where he possessed anhydrous with the intent to commit the felony of manufacturing methamphetamine.

People v. McCarty & Reynolds, 223 Ill.2d 109, 858 N.E.2d 15 (2006) 720 ILCS 570/401(a)(6.5)(D), which imposes a sentence of 15 to 60 years for manufacture of more than 900 grams of any substance containing methamphetamine, was intended to include byproducts of the manufacturing process in the weight calculation. The court concluded that the plain and ordinary meaning of the statute includes byproducts which contain even a trace element of methamphetamine. Furthermore, because the statute is aimed at protecting society from the dangers of the manufacturing process, the legislature's decision to include byproducts is not irrational. The court also found that §41(a)(6.5)(D): (1) does not violate the proportionate penalties clause by imposing a shocking and disproportionate sentence for the production of byproducts which do not contain appreciable portions of usable methamphetamine, and (2) is sufficiently related to the particular evil that the legislature was targeting - the manufacturing process - to satisfy due process.

Illinois Appellate Court

People v. Solis, 2019 IL App (4th) 170084 Defendant was entitled to day-for-day sentencing credit for methamphetamine delivery (more than 15 but less than 100 grams). The 75% provision of 730 ILCS 5/3-6-3(a)(2)(v) (2014), applies only to convictions involving more than 100 grams. The State conceded error and the Appellate Court ordered a correction of the sentencing judgment.

The defendant's 18-year sentence, however, was upheld against a challenge to the fairness of the sentencing hearing. The sentencing court could properly refuse to consider defendant's mental impairment as a mitigating factor where the record shows defendant knew right from wrong. The sentencing court may also properly reject the defense argument

that defendant's drug dealing did not cause or threaten harm, by finding that drug delivery causes harm in general. Such a consideration was not inherent in the offense, but rather a response to the defense argument.

People v. Miramontes, 2018 IL App (1st) 160410 Counsel's stipulation to the quantity of methamphetamine constituted ineffective assistance where three separate bags of a whitish substance had been recovered by the police but were combined before any of the bags could be tested independently. Relying on **People v. Coleman**, 2015 IL App (4th) 131045, the Court concluded that it could only speculate about whether all three of the bags contained methamphetamine prior to combining them. Because defendant may have been convicted of possession of a lesser quantity had counsel not stipulated to the combined quantity, defendant was prejudiced, and the matter was reversed and remanded for a new trial.

People v. Long, 2018 IL App (4th) 150919 The State failed to prove conspiracy to manufacture 400 to 900 grams of methamphetamine, but it did prove conspiracy to manufacture 100 to 400 grams. Defendant purchased fuel in order to help two men manufacture meth, and police discovered over 400 grams of meth in the men's trailer. The evidence showed the men had cooked meth prior to defendant's purchase. About 250 grams were found in a bathroom sink near the fuel; two other batches were in a bedroom. The Appellate Court rejected the defendant's argument that none of the meth could be attributed to a cook conducted with the fuel defendant provided, finding a reasonable inference that the men used the fuel to cook the meth in the sink. It would not make the same inference for the fuel found in the bedroom, and reduced the conviction from Class X with a 12-to-50-year range to Class X with a 9-to-40-year range.

People v. Marzonie, 2018 IL App (4th) 160107 Defendant was convicted of four meth-based charges based on his possession of meth, various precursors, and manufacturing material. Defendant alleged that the counts all merge into Count 1, "participating in the manufacture of meth," under the one-act, one-crime rule. The court disagreed, finding that the three remaining convictions – possession of methamphetamine; possession, transportation, or storage of a methamphetamine precursor in any form other than a standard dosage form with the intent to manufacture; and possession, transportation, or storage of methamphetamine manufacturing material with the intent to manufacture – are not based on the same act. Although closely related, the separate acts support multiple convictions. Participation in particular includes merely assisting in the production of meth, a different act than possession.

People v. Brace, 2017 IL App (4th) 150388 To be guilty of the offense of unlawful possession of methamphetamine precursors without a prescription, the State must prove that a defendant with a prior conviction for a methamphetamine offense knowingly possesses any substance containing a methamphetamine precursor without a prescription. 720 ILCS 646/120(a). Pseudoephedrine is a methamphetamine precursor. 720 ILCS 646/10.

At a bench trial, the parties stipulated that defendant had a prior conviction for unlawful possession of methamphetamine and had purchased pseudoephedrine. There was no evidence about whether defendant had a prescription. On appeal, defendant argued that the State failed to prove her guilty beyond a reasonable doubt because it failed to prove that she lacked a prescription.

The court rejected this argument. The statute criminalizes the knowing possession of a methamphetamine precursor after being convicted of a methamphetamine offense. Persons

with a valid prescription are exempted. The prescription exception is not a part of the body of the offense. Instead, it merely withdraws certain people from the operation of the statute. Thus the exception is a matter of defense and the State has no burden to disprove it.

Defendant's conviction was affirmed.

People v. Fickes, 2017 IL App (5th) 140300 A defendant commits aggravated participation in methamphetamine manufacturing when he knowingly participates in making methamphetamine within 1000 feet of a place of worship. 720 ILCS 646/15(b)(1)(H). A place of worship is defined as "a church, synagogue, mosque, temple, or other building, structure, or place used primarily for religious worship." 720 ILCS 5/2-15b.

The State introduced evidence connecting defendant to materials used to manufacture methamphetamine. The police found these materials at a house that was, based on their measurements, 111 feet from Saint James Lutheran Church. Defendant was convicted of aggravated participation in methamphetamine manufacturing.

The court held that the State failed to prove that the offense occurred within 1000 feet of a place of worship since there was no evidence that the church was used as a place of worship when the offense took place. Although the State's witnesses identified the building as Saint James Lutheran Church, there was no testimony that they were familiar with the church on the date in question or that it was functioning primarily as a place of worship on that date or any date. "As a matter of both logic and common sense, there is no inherent rational connection between a witness's mere use of the term 'church' at trial and the fact that the 'church' was or was not functioning primarily as a place of worship on a particular date prior to trial."

The court reduced defendant's conviction to simple participation in methamphetamine manufacturing and remanded for a new sentencing hearing on that conviction.

People v. Laws, 2016 IL App (4th) 140995 Section 120(a) of the Methamphetamine Control and Community Protection Act makes it illegal for a defendant who has been found guilty of methamphetamine possession to knowingly thereafter possess without a prescription any substance containing a methamphetamine precursor. 720 ILCS 646/120(a)

The evidence showed that defendant, who had a previous conviction for possession of methamphetamine, purchased Sudafed without a prescription. Sudafed contains pseudoephedrine, a methamphetamine precursor. Defendant argued that the State failed to prove him guilty beyond a reasonable doubt because it failed to show that he knew Sudafed contained a methamphetamine precursor.

The court rejected his argument. It held that knowledge as a criminal *mens rea* applies only to the possessory element not to the illegal nature of the contraband. Since the ingredients of Sudafed are listed on the package, the failure to know that pseudoephedrine is a methamphetamine precursor is simply a mistake of law and is not a defense.

The court affirmed defendant's conviction.

People v. Lewis, 2016 IL App (4th) 140852 Defendant was convicted under section 120(a) of the Methamphetamine Control and Community Protection Act (MCCPA) which prohibits a person with a prior conviction under the MCCPA from purchasing or possessing a methamphetamine (meth) precursor (such as pseudoephedrine) without a prescription. Defendant argued that the MCCPA (1) violates due process by punishing wholly innocent conduct and (2) violates due process, equal protection, and the proportionate penalties clause because a violation of the MCCPA is a felony, while a violation of the Methamphetamine

Precursor Act (MPA) which involves similar or less culpable conduct is only a misdemeanor. The court rejected these arguments and upheld the constitutional validity of the MCCPA.

1. In deciding whether a statute that does not implicate fundamental rights violates due process (Ill. Const. 1970, art. I, §2; U.S. Const., amend. XIV), the proper inquiry is whether it bears a rational relationship to a legitimate state goal. Such a rational relationship is lacking where a statute punishes wholly innocent conduct. Wholly innocent conduct is conduct unrelated to the legislative purpose and devoid of criminal intent.

The purpose of the MCCPA is to protect the public from the use and distribution of meth. The MCCPA reasonably serves this purpose by regulating the possession of meth precursors by people who have demonstrated a tendency to misuse those substances. Possession of a meth precursor without a prescription by people previously convicted under the MCCPA is not innocent conduct and thus the MCCPA does not violate due process by punishing innocent conduct.

2. A statute may violate the proportionate penalties clause (Ill. Const. 1970, art. I, §11), where it contains a penalty greater that the penalty imposed for an offense with identical elements. Violation of the MCCPA is a Class 4 felony, while violation of the MPA is a Class A misdemeanor. But the MCCPA and the MPA do not have identical elements. The MPA prohibits a person with a prior conviction for any meth-related crime from purchasing or acquiring 7500 milligrams of ephedrine or pseudoephedrine within a 30-day period. 720 ILCS 648/20(b), 40(a)(2)(A). The MCCPA merely requires a prescription to purchase or possess a meth precursor.

The MCCPA also does not violate due process by punishing less culpable conduct more seriously than the MPA. It is within the legislature's purview to determine the seriousness of the crime and it has properly determined that violating the MCCPA involves more serious conduct than violating the MPA. For similar reasons, the MCCPA does not violate equal protection. The existence of different punishments for different offenses does not offend equal protection.

People v. Schmidt, 405 Ill.App.3d 474, 938 N.E.2d 559 (3d Dist. 2010) 720 ILCS 646/35, which prohibits a person from knowingly using or allowing the use of a vehicle, structure, real property or personal property within his control to commit a methamphetamine violation, does not violate due process. Furthermore, §35 is not unconstitutionally overbroad or vague.

Legislation which does not affect a fundamental constitutional right satisfies due process if: (1) it bears a reasonable relationship to the public interest intended to be served by the statute, and (2) the means adopted are reasonable to accomplish the desired objective. Because defendant was charged with using his personal vehicle to commit a methamphetamine violation, the court found that it need not consider other scenarios which might have presented issues concerning the constitutionality of §35. The court also held that the statute bears a rational relationship to the interest of safeguarding the public from the harm caused by manufacturing and distributing methamphetamine. Furthermore, the statute adopts a reasonable method of protecting the public by prohibiting the use of a vehicle to manufacture or possess methamphetamine.

The court rejected the argument that the statute is void for vagueness, finding that it is sufficiently clear to provide fair notice to a person with ordinary intelligence that using a vehicle to commit a methamphetamine crime constitutes the offense of unlawful use of property. In addition, the statute is not subject to arbitrary or discriminatory enforcement.

Finally, the court rejected the argument that §35 is overbroad because it is impossible to violate the Methamphetamine Control and Community Protection Act without also

committing unlawful use of property. Under U.S. Supreme Court precedent, an overbreadth argument rarely will succeed where the law in question does not specifically address speech or conduct necessarily associated with speech (such as picketing or demonstrating). (See **Virginia v. Hicks**, 539 U.S. 113 (2003)).

People v. Dorsey, 362 Ill.App.3d 263, 839 N.E.2d 1104 (4th Dist. 2005) Defendant was convicted, in a jury trial, of unlawful possession of a methamphetamine manufacturing chemical with intent to manufacture 30 to 150 grams of a substance containing methamphetamine. After he was arrested, defendant told police that he and a friend intended to acquire 5,000 pseudoephedrine pills, five cans of Coleman fuel, and two packages of lithium batteries in order to manufacture 100 grams of methamphetamine. At the time of his arrest, defendant was in possession of 552 pseudoephedrine pills and one can of Coleman fuel. The Appellate Court concluded that defendant could not be convicted of possession with intent to manufacture 30 to 150 grams of a substance containing methamphetamine when at most, about 15 grams of methamphetamine could have been derived from the 552 pseudoephedrine pills which defendant actually possessed. 720 ILCS 570/401 prohibits the possession of any amount of methamphetamine manufacturing chemical with the intent to manufacture methamphetamine. Possession of such a chemical with the intent to manufacture 30 to 150 grams of methamphetamine carries a sentence to 6 to 30 years, while possession with the intent to manufacture less than 15 grams of methamphetamine carries a sentence of three to seven years.

§13-6
Paraphernalia

Illinois Appellate Court

People v. Fiumetto, 2018 IL App (2d) 170230 When determining whether a requirement of a criminal statute is a description of the offense which must be included in the charging instrument, or merely an exception, courts look to whether the language describes the crime or whether it describes persons. If the language designates certain persons not covered by the statute, it is an exception. Here, Section 1(a) of the Syringes Act begins with the phrase "[e]xcept as provided in subsection (b)." 720 ILCS 635/1(a) (2016). In turn, section 1(b) states that any person who is at least 18 years old may possess up to 20 syringes if she has purchased them from a pharmacy. Because this language describes persons, it qualifies as an exception rather than a description of the offense, and need not be alleged in the charging instrument.

An ordinary spoon (as opposed to a miniature cocaine spoon under 720 ILCS 600/2(d)(5)(D)(2016)), does not qualify as "drug paraphernalia," even when found near a syringe, because section 4(b) of the Paraphernalia Act exempts any item used to ingest "any other lawful substance." 720 ILCS 600/4(b) (2016).

People v. Carreon, 2011 IL App (2d) 100391 The Drug Paraphernalia Control Act defines drug paraphernalia as "all equipment, products and materials of any kind . . . intended to be used unlawfully in . . . ingesting, inhaling or otherwise introducing into the human body cannabis or a controlled substance." 720 ILCS 600/2(d). The Act exempts "[i]tems historically and customarily used in connection with the . . . ingesting, or inhaling of tobacco or any other lawful substance . . . includ[ing], but not limited to . . . tobacco pipes, and cigarette rolling papers." 720 ILCS 600/4(b). The Act also specifies factors to be considered in determining

whether an item is exempt from the Act. Relevant to this determination is "the general, usual, customary, and historical use to which the item involved has been put" and "the existence and scope of legitimate uses for the object in the community." 720 ILCS 600/4(d)(1), (d)(8).

A cigar that tests positive for the presence of cannabis does not qualify as drug paraphernalia under the statute as a matter of law. The plain language of the Act evidences the intent of the legislature to exempt any item traditionally used to ingest tobacco. Cigars, like cigarette-rolling papers that are expressly exempted by the Act, are designed and specifically sold for the ingestion of tobacco. When a cigar is modified to allow cannabis to be wrapped in the cigar, the cigar acts as nothing more than a large cigarette-rolling paper. Although cigars can be used to ingest cannabis, cigarette-rolling papers can be, and likely often are, used to ingest cannabis, but neither qualifies as drug paraphernalia because both are historically and customarily used for the legal ingestion of tobacco.

Defendant stipulated at trial that the arresting officer would testify that, in his experience, cigars are used to ingest cannabis. This stipulation did not amount to a stipulation that a cigar constitutes drug paraphernalia, and therefore did not foreclose defendant from arguing on appeal that the cigar did not qualify as drug paraphernalia.

The court reversed defendant's conviction for possession of drug paraphernalia.

People v. Harrell, 342 Ill.App.3d 904, 795 N.E.2d 1022 (2d Dist. 2003) Adopting the reasoning of **People v. Reeves**, 326 Ill.App.3d 1083, 762 N.E.2d 1124 (4th Dist. 2002), the Appellate Court held that a defendant may be convicted of possession of "drug paraphernalia" under 720 ILCS 600/3.5 only if the items in question are "peculiar to" and marketed for use in "growing, producing, storing or ingesting" drugs. The court concluded that the plain language of the statutory definition of "drug paraphernalia" precludes a conviction for possession of a pipe which defendant admittedly used to smoke cocaine, but which was not shown to have been marketed for that purpose.

People v. Hughes, 343 Ill.App.3d 506, 798 N.E.2d 763 (5th Dist. 2003) Under the plain language of the Drug Paraphernalia Control Act (720 ILCS 600/2(d)), unlawful possession of drug paraphernalia is committed only where the State proves that the items in question are "peculiar to" *and* "marketed for use in" growing, producing, storing or ingesting cannabis or a controlled substance. (720 ILCS 600/2(d)). An item is not "peculiar" to the use of drugs merely because it can be used with drugs. Although items recovered from the defendant's residence (including scales, syringes, coffee filters, pseudoephedrine tablets, lithium batteries and a plastic hose) *could* be used in the production of methamphetamine, they are not primarily used and marketed for such use. Thus, they are not "drug paraphernalia" as defined by §600/2(d).

People v. Reeves, 326 Ill.App.3d 1083, 762 N.E.2d 1184 (4th Dist. 2002) Under 720 ILCS 600/2(d), which defines "drug paraphernalia" as "all equipment, products and materials of any kind which are peculiar to and marketed for use in" growing, producing, storing or ingesting cannabis or a controlled substance, an item constitutes "drug paraphernalia" only if it has been "marketed" for such use. Thus, "home made items which have never been marketed cannot constitute drug paraphernalia."

People v. Hansen, 185 Ill.App.3d 560, 541 N.E.2d 816 (4th Dist. 1989) The defendant was convicted and sentenced to probation, pursuant to §410 of the Controlled Substances Act, under which his conviction would be vacated upon successful completion of his term of probation. The defendant successfully completed his probation and petitioned the court for expungement of his arrest records. The trial court denied the petition.

On appeal, the defendant argued that the probation provision of the Controlled Substances Act provides for expungement of arrest records upon successful completion of first time offenders even though §55a of the Civil Administrative Code of Illinois states that the Illinois State Police shall retain a permanent record of all arrests within the state. The trial court found that this conflict prevented it from exercising its discretion to expunge the defendant's record. The Appellate Court found that no conflict existed. Section 410 gives trial courts authority to expunge the records of the local police and the circuit court, while §55a controls the State Police.

§13-7
Drug-Induced Homicide

Illinois Supreme Court

People v. Nere, 2018 IL 122566 Under the drug-induced homicide statute, the State must prove that defendant delivered a controlled substance to another person and that person's death was caused by the ingestion of that substance. 720 ILCS 5/9-3.3(a). Illinois is a "contributing cause" state. The drug-induced homicide statute does not require that ingestion of the controlled substance be a "but-for" cause of the death.

IPI Criminal 7.15 is a generally correct statement of the law of causation for drug-induced homicide. That instruction states, in relevant part, that to find causation, the State must prove:

that defendant's acts were a contributing cause of the death and that the death did not result from a cause unconnected with the defendant. However, it is not necessary that you find the acts of the defendant were the sole and immediate cause of death.

Here, the IPI should have been modified to refer only to the defendant's delivery of heroin as a contributing cause of the victim's death, rather than to "defendant's acts" as a contributing cause, because there was evidence that defendant delivered multiple controlled substances, but she was only charged with drug induced homicide on the basis of the heroin. However, the error was harmless because the instructions as a whole clearly conveyed that defendant was only charged with heroin delivery and that the jury had to find the death was caused by the heroin.

Illinois Appellate Court

People v. Zarbock, 2022 IL App (2d) 210238 The trial court acquitted defendant of drug-induced homicide but convicted him of the uncharged, lesser-included offense of possession of a controlled substance. Defendant challenged his conviction on appeal, arguing that PCS is not a lesser-included offense of drug-induced homicide.

Defendant did not forfeit the issue despite failing to challenge the finding in a post-trial motion. Whether an uncharged offense is a lesser-included offense of a charged offense presents a constitutional issue of due process. Defendant's objection in his written closing argument satisfied the exception that constitutional issues that were raised at trial and could be raised in a post-conviction petition may be advanced on direct appeal without first being presented in a post-trial motion.

When the issue is whether an uncharged offense is a lesser-included offense of a charged offense, courts employ the charging-instrument approach. Under the charging-

instrument approach, a court looks to the charging instrument to see whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense.

Here, the charging instrument, an indictment alleging defendant, or one for whom he was accountable, committed drug-induced homicide by delivering heroin to another, and that the victim died after ingesting this heroin. The indictment did not provide factual details, such as where the drugs were delivered, who delivered them, and whether the victim who ingested them actually received delivery of it. Therefore, the indictment did not outline the lesser-included offense, and defendant did not receive sufficient notice that he may be held accountable for the victim's possession of the controlled substance. The appellate court vacated defendant's conviction.

People v. Coots, 2012 IL App (2d) 100592 A person commits drug-induced homicide by unlawfully delivering a controlled substance to another where that person's death is caused by ingestion of that controlled substance. 720 ILCS 5/9-3.3(a). "Delivering" is "the actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h).

Joint and simultaneous acquisition of contraband by the defendant and a co-user for their own use, in itself, will not support a conviction for drug-induced homicide. There must be something more than a co-purchase by truly equal partners. But defendant is guilty of a delivery that will support a conviction for drug-induced homicide if he separately procures the drug in the absence of the co-user, even if the co-user is also a co-purchaser, then physically transfers possession to the co-user, with no intent to convey any to a third party. In that situation, the co-users are not truly equal partners because one has taken a more active role in carrying out the drug transaction.

Defendant and her co-user both participated actively in procuring the heroin that caused the death of the co-user. The co-user originated the idea and paid for the heroin. However, defendant actually made the calls, located a supplier, and ordered the drug. Both defendant and the co-user were present for the delivery. However, the supplier gave the heroin to the defendant who put it in her pocket, before giving it to the co-user.

The Appellate Court concluded that this evidence, which was undisputed, allowed a reasonable jury to either convict or acquit, depending on the inferences that the jury drew from the evidence. A rational jury could conclude that defendant alone possessed the heroin that caused the death because she had the bags in her pocket and momentarily withheld it from the co-user. A rational jury could also conclude that the defendant and the co-user jointly possessed the drugs because "much of what defendant told the detectives could be read this way, *e.g.*, 'it was his money, he paid for it.'"

Because a rational jury could find that defendant delivered the drugs, the court affirmed defendant's conviction for drug-induced homicide.

§13-8
Drug Court/Probation

Illinois Supreme Court

People v. Mathey, 99 Ill.2d 292, 458 N.E.2d 499 (1983) The defendants contended that Ch. 56½, ¶710 is unconstitutional because it prohibits "first offender" probation for defendants convicted of possession of 30 to 500 grams of cannabis (Ch. 56½, ¶704(d)) but allows "first offender" probation for persons convicted of possession of up to 200 grams of barbiturates, amphetamines or peyote (Ch. 56½, ¶¶1402(b) & 1410). Under "first offender" probation, the

record of the case is stricken and there is no public record of conviction when a defendant successfully completes the probation. The Supreme Court upheld the validity of ¶710, finding that it violates neither equal protection or due process. Equal protection "does not mandate that possessors of marijuana be eligible for first-offender probation whenever possessors of barbiturates are so eligible," because the two substances are not "similarly situated."

Illinois Appellate Court

People v. Paranto, 2020 IL App (3d) 160719 The trial court erred in refusing to order a drug court eligibility screening where defense counsel requested one. Defendant was not statutorily ineligible for drug court. Contrary to the court's belief, aggravated DUI is not a "crime of violence" as defined in the Drug Court Treatment Act [730 ILCS 166/20]. Accordingly, the court was required to order a screening. The Appellate Court vacated defendant's sentence and remanded so that defendant could be assessed for drug court eligibility.

People v. Anderson, 358 Ill.App.3d 1108, 833 N.E.2d 390 (4th Dist. 2005) The Drug Court Act (730 ILCS 166/35) authorizes judicial circuits to operate drug court programs. A program may be preadjudicatory, where the drug treatment occurs before a conviction (or even before the filing of a criminal case), or post-adjudicatory, in which the treatment occurs after a conviction has been entered. Under the former model, the criminal charges are held in abeyance until the drug treatment program is completed either successfully or unsuccessfully. If the treatment is successful, the charges are dismissed or *nol processed*. If the treatment is unsuccessful, the charges may be reinstated.730 ILCS 166/35, which governs the violation, termination and discharge of a defendant from "drug-court" programs, implies that when the defendant is alleged to have violated the conditions of the program, the trial court should consider evidence of the defendant's conduct rather than merely enter a summary order terminating drug court participation. In addition, due process requires that before a defendant may be terminated from a drug court program, he should be informed of the nature of the alleged violation and the evidence against him, and be given an opportunity to appear and be heard. In addition, the trial court should determine from the evidence whether the defendant in fact violated any conditions of the program. If a violation has occurred in a preadjudicatory system, the court should determine whether defendant should be tried on the original offense or if some other step, in accordance with the program guidelines, would improve the likelihood of rehabilitation.

§13-9
Fines

Illinois Supreme Court

People v. Lewis, 234 Ill.2d 32, 912 N.E.2d 1220 (2009) 730 ILCS 5/5-9-1.1(a) provides that a person convicted of certain drug offenses "shall" be assessed a fine that is "not less than the full street value" of the substance seized. The street value of a substance "shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value."

The purpose of the street value fine is to discourage illegal drug transactions by removing the profit incentive for drug trafficking. In order to ensure that the street value

fine equals at least the full current value of the substances seized, the trial court must have some evidentiary basis for the fine.

The court rejected the State's argument that §5-9-1.1(a) is satisfied so long as testimony is presented concerning the quantity of controlled substances seized from the defendant. Instead, there must be some evidentiary basis for the amount of the fine, either in testimony at sentencing, a stipulation, or reliable evidence presented at a previous stage of the proceedings.

Although defendant failed to object in the trial court to the lack of an evidentiary basis, imposition of a street value fine in the absence of sufficient evidence satisfies the "fundamental fairness" prong of the plain error rule.

People v. Lusietto, 131 Ill.2d 51, 544 N.E.2d 785 (1989) Defendant pleaded guilty to unlawful delivery of 69.5 grams (or 2.5 ounces) of cocaine. There was no evidence that a sale price had been agreed upon when the defendant was arrested, but there was evidence that defendant was to pay his supplier $1,900 per ounce for the cocaine. An experienced narcotics officer testified that cocaine is typically sold by the gram for a price of $100. The defendant contended that the value of the above cocaine for the purpose of the mandatory "street value" fine under Ch. 38, §1005-9-1.1 should have been $1,900 per ounce ($4,750), and not $100 per gram ($6,950). The Supreme Court held that the trial judge properly calculated the "street value" of the cocaine to be $100 per gram. The defendant's claim that the value of the cocaine was $1,900 per ounce "does not reflect the full street value of the drugs seized," because that price was to be paid to an intermediate supplier and not to a street seller by a street buyer.

People v. Harmison, 108 Ill.2d 197, 483 N.E.2d 508 (1985) The Supreme Court upheld the statute, which requires a fine of not less than the full street value of the cannabis or controlled substance defendant possessed or delivered. The Court rejected contentions that the mandatory fine violates due process, equal protection and the separation of powers doctrine.

Illinois Appellate Court

People v. Anderson, 2018 IL App (4th) 160037 Defendant was convicted of armed violence, unlawful use of weapon by a felon, and unlawful possession of a controlled substance with intent to deliver. Under the Controlled Substances Act [720 ILCS 570/411.2], where an individual is convicted of a violation of the Act, there is a mandatory assessment which varies in amount based upon the class of the conviction. Defendant's unlawful possession conviction was a Class 2 felony, and his armed violence conviction, which was premised on his possession of cocaine while armed with a handgun, was a Class X felony. The Appellate Court rejected the State's argument that the armed violence conviction required imposition of an assessment for a Class X felony. The unlawful possession conviction was the relevant offense to consider in determining the amount of the assessment because it is a violation of the Controlled Substances Act while armed violence is not.

People v. Rodriguez, 2018 IL App (3d) 160440 Before imposing the street value fine for a conviction under the Controlled Substances Act, as required by 730 ILCS 5/5-9-1.1(a), the trial court must receive evidence of the value on the record. When the fine is imposed without this evidence, it must be vacated. Although defendant argued that remand for an evidentiary hearing and a new fine is no longer permissible following abolition of the void sentencing rule, the Appellate Court, over dissent, disagreed. It held that the case could be remanded

because the trial court had jurisdictional power when it imposed the fine; it simply failed to comply with statutorily required procedures.

People v. Nelson, 2013 IL App (3d) 110581 Defendant entered a plea agreement which provided for a reduction in the charge to a Class II felony, but contained no agreement on sentencing. At the sentencing hearing, the trial court asked the prosecutor whether he had prepared an order for the street value fine. The prosecutor replied that the street value fine should be $600. Defendant was sentenced to probation and ordered to pay a $600 street value fine.

Although defendant did not respond to the prosecutor's assertion concerning the street value fine, object to the fine, or raise the issue in his post-trial motion, the plain error doctrine applies where the trial court imposes a street value fine without a proper evidentiary basis. (**People v. Lewis**, 234 Ill. 2d 32, 912 N.E.2d 1220 (2009)). The evidentiary basis for a street value fine may be provided by testimony at the sentencing hearing, the parties' stipulation as to the value of the substance, or reliable evidence presented at an earlier stage of the proceedings. Because there was no evidentiary basis for the street fine, the cause was remanded for a new hearing on the fine.

The court rejected the State's argument that defendant's failure to object when the prosecutor claimed a $600 value for the controlled substances amounted to a stipulation by silence. Rejecting **People v. Blankenship**, 406 Ill. App. 3d 578, 943 N.E.2d 1111 (2d Dist. 2010), the court concluded that the defendant's silence when the State offers an opinion on street value cannot amount to a stipulation. The court noted that in **Mitchell v. U.S.**, 526 U.S. 314, ___ S.Ct. ___, ___ L.Ed.2d ___ (1999), the Supreme Court concluded that even a defendant who pleads guilty has a Fifth Amendment right against self-incrimination throughout the sentencing hearing, and that the sentencing court imposes an impermissible burden on that right by drawing an adverse inference from the defendant's silence concerning facts relating to the crime.

Because the street value fine is part of the sentence, the value of the controlled substances in question relates to the facts of the crime. Thus, under **Mitchell**, the trial court could not draw an adverse inference from defendant's silence in response to the prosecutor's statement of opinion concerning the value of the substances. "[U]ntil the judgment of conviction against defendant became final, his silence on matters relating to the street value of the drugs could not be construed as a stipulation to the amount."

Finding a stipulation by silence under these circumstances would violate established law. Stipulations are agreements between the parties or their attorneys with respect to an issue before the court. To be enforceable, a stipulation must be clear, certain, and definite in its material provisions, and must be agreed to by the parties or their representatives. A stipulation can be found only if it is clear that the parties intended to stipulate to a fact.

Here, the only evidence supporting a stipulation is that defendant was silent when the prosecutor offered an opinion concerning the value of the substances. The court concluded that it could not find that defendant intended to be bound by the State's opinion, and that a stipulation therefore could not be found.

People v. Devine, 2012 IL App (4th) 101028 Under 730 ILCS 5/5-9-1.1(a), the sentence for a drug related offense involving possession or delivery of cannabis or a controlled substance must include a fine equal to the full street value of the cannabis or controlled substance in question. The court found that there is no *de minimis* exception to this requirement; thus, the trial court erred by failing to impose a street value fine although the prosecutor asked that no fine be imposed because defendant had possessed only cocaine residue.

People v. Blankenship, 406 Ill.App.3d 578, 943 N.E.2d 111 (2d Dist. 2010) 730 ILCS 5/5-9-1.1 provides that where the defendant is convicted of a drug related offense involving cannabis or a controlled substance, the court shall levy a fine of not less than the full street value of the substance seized. Street value is determined by the trial court based on testimony as to the amount seized "and such testimony as may be required by the court as to the current street value" of the substance. Street value may be set by stipulation, testimony, or reliable evidence.

The court concluded that defendant "tacitly stipulated" to a street value fine of $10 where the trial court asked the parties for input concerning the fine, and the defense did not dispute the prosecutor's representation of the street value. "Stipulations by silence have been found under comparable circumstances."

People v. Bond, 405 Ill.App.3d 499, 942 N.E.2d 585 (4th Dist. 2010) As a matter of plain error, the trial judge erred by imposing a street value fine based on an inaccurate belief as to the weight of the controlled substance possessed by the defendant. The street value fine was vacated and the cause remanded for imposition of an appropriate fine.

People v. McCreary, 393 Ill.App.3d 402, 915 N.E.2d 745 (2d Dist. 2009) Rejecting the reasoning of **People v. Jolly**, 357 Ill.App.3d 884, 830 N.E.2d 860 (4th Dist. 2005), the court concluded that a defendant who pleads guilty to a controlled substances offense which results in the imposition of a "street value" fine may challenge that fine on appeal even where no challenge was raised in the post-plea motion. "We see no reason why, when it comes to reviewing an unpreserved claim that a street-value fine was improperly imposed, a defendant who pleaded guilty should be treated any differently than a defendant who was found guilty following a trial." The court also noted that Supreme Court Rule 615(a) does not make the plain error rule inapplicable to persons who plead guilty.

People v. Roberts, 338 Ill.App.3d 245, 788 N.E.2d 782 (2d Dist. 2003) Because 730 ILCS 5/5-9-1.1(a) authorizes the imposition of a street value fine only if the defendant is convicted of possession or delivery of cannabis or a controlled substance, the trial court erred by imposing a street value fine on a conviction for possession with intent to deliver of a look-alike substance. Similarly, because 730 ILCS 5/5-9-1.1(b) authorizes the imposition of a Trauma Center fine only where a street value fine is authorized, the trial court erred by imposing a $100 Trauma Center fine.

People v. Gathing, 334 Ill.App.3d 617, 778 N.E.2d 215 (3d Dist. 2002) The $5.00 credit against fines for each day of presentence incarceration applies to a "mandatory drug assessment" imposed under 720 ILCS 570/411.2(a)(1), which imposes a penalty ranging from $200 to $3,000 for certain drug offenses. Noting that the assessment is forwarded to the State Treasurer to be deposited in the Drug Treatment Fund and that a "fine" is defined as a "pecuniary criminal punishment or civil penalty payable to the public treasury," the court held that the assessment is in the "nature of a fine" and therefore subject to the credit.

People v. Gonzalez, 316 Ill.App.3d 354, 736 N.E.2d 157 (1st Dist. 2000) 730 ILCS 5/5-9-1.1 provides that the mandatory street value fine is to be "determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value." As a matter of plain error, the trial judge erred by relying on the arrest report to set the street value fine

where there was no foundation to establish the source of the estimate or how the amount was calculated.

People v. Nixon, 278 Ill.App.3d 453, 663 N.E.2d 66 (3d Dist. 1996) The Appellate Court held that under **People v. Robinson**, 167 Ill.2d 397, 657 N.E.2d 1020 (1995), the State need not test samples from each of several containers of drugs in order to prove the amount of controlled substance for purposes of the street value fine. Therefore, defendant's street value fine could properly be based on possession of 6.6 grams of cocaine though only 2.2 grams were tested.

People v. Simpson, 272 Ill.App.3d 63, 650 N.E.2d 265 (4th Dist. 1995) Defendant's sentence included a street value fine of $49,350. The trial court based the street value fine solely on the prosecutor's "suggestion of $100 per gram." The Appellate Court held that a street value fine is to be based on "testimony of law enforcement personnel and the defendant," and on other testimony "as may be required." (730 ILCS 5/5-9-1.1). It was error for the trial judge to merely accept the prosecutor's suggestion of street value. A trial judge is not presumed to know the appropriate street value of a substance based upon his or her experience in other drug cases.

People v. Price, 227 Ill.App.3d 253, 591 N.E.2d 99 (4th Dist. 1992) A trial judge normally cannot impose a street value fine which includes contraband involved in a dismissed charge However, where the defendant knowingly enters a plea agreement providing for what would otherwise be an unauthorized sentence, the street value fine can include the substance involved in the dismissed count.

People v. Tyson, 221 Ill.App.3d 256, 581 N.E.2d 694 (3d Dist. 1991) The defendant's sentence included a street value fine of $3,380. The Appellate Court held that there was insufficient evidence to justify the amount of the fine. Seven packets of white powdery substance and more than $2,000 in cash were found on defendant's person. The arresting officer testified that all the packets appeared to contain the same amount of substance, and he estimated their weight as "somewhere in excess of ten to 15 grams." However, only one of the packets was weighed by the crime lab. In addition, a complaint for forfeiture of the money found on defendant, alleged that *six* of the packets weighed between one-fourth and one-eighth grams each. Finally, in closing argument the prosecutor stated that the packets were worth $350 each. The Court found that the police estimate of the amount of cocaine seized "can only be termed as a wild guess" and was contradicted by the forfeiture complaint. Also, the prosecutor's "understanding" of what the cocaine was worth was unsupported and appears "extremely inflated." Although the amount of evidence necessary to establish street value "obviously varies from case to case," there must be "some concrete, evidentiary basis for the fine imposed."

People v. Smith, 198 Ill.App.3d 695, 556 N.E.2d 307 (3d Dist. 1990) The defendant was charged with four drug offenses. He pleaded guilty to one offense — unlawful delivery of cocaine - and the other charges were dismissed. Defendant's sentence included a mandatory street value fine of $895, based upon the total amount of drugs delivered including those that supplied the basis for the three dismissed charges. The Appellate Court held that under Ch. 38, ¶1005-9-1.1, the defendant should have been fined for only the contraband delivered in the charge of which he was convicted.

People v. Pehrson, 190 Ill.App.3d 928, 547 N.E.2d 613 (2d Dist. 1989) The defendant was convicted of delivering 1.8 grams of cocaine with a street value of $100 per gram. A fine of $1,000 was imposed which the defendant contended was improper because it exceeded the street value of the cocaine. The Appellate Court held that under §1005-9-1.1, the mandatory fine must be assessed "at not less" than the street value "and does not limit the potential to increase that amount."

People v. Schillaci, 171 Ill.App.3d 510, 526 N.E.2d 871 (4th Dist. 1988) Defendant was convicted for unlawful delivery of cocaine and as part of his sentence was ordered to pay a $5,000 discretionary fine. The Appellate Court held that a discretionary fine may be imposed in addition to any other penalty (Ch. 56½, ¶1411.1), but in determining whether such a fine should be imposed the trial judge must consider the defendant's income (regardless of source), his earning capacity and his financial resources, "as well as the nature of the burden the fine will impose on the defendant and any person legally or financially dependent upon the defendant" Here, the record was "devoid of any evidence of defendant's financial ability to comply with the court's order." The Court concluded that the discretionary fine was "extreme." for a defendant who had six dependents, liens against all his possessions, and cash assets that were insufficient to release him from debt.

People v. Costales, 166 Ill.App.3d 234, 520 N.E.2d 42 (4th Dist. 1987) Defendant was convicted of armed violence and unlawful delivery of a controlled substance because he was armed with a switchblade knife when he made the unlawful delivery. A mandatory drug fine was imposed on the armed violence conviction. No sentence was imposed on the drug conviction. Defendant contended that the mandatory drug fine was improperly imposed for armed violence but the Appellate Court held that the statue refers to "a drug related offense" and does not limit its application to offenses under the Cannabis Control Act or the Controlled Substances Act.

People v. Branch, 143 Ill.App.3d 679, 493 N.E.2d 417 (3d Dist. 1986) The Court rejected the defendant's contention that the mandatory fine provision was impliedly repealed by Ch. 56½, ¶¶710.1 & 1411.1 (eff. Jan. 1, 1984), which provides for the imposition of a discretionary fine in controlled substance cases. The provisions are not in conflict, because the mandatory fine is "in addition to any other penalty." Thus, "the discretionary fine may be imposed in addition to a mandatory fine or any other penalty." See also, **People v. Moffitt**, 138 Ill.App.3d 106, 485 N.E.2d 513 (2d Dist. 1986).

People v. Beavers, 141 Ill.App.3d 790, 491 N.E.2d 438 (3d Dist. 1986) Defendant was convicted of selling cocaine to an undercover agent, and received a "street value" fine based upon $400 per gram. The evidence at sentencing showed that Department of Law Enforcement statistics estimated the street value of cocaine at $400 per gram. However, the undercover agent in this case paid defendant $100 per gram for the cocaine. The Appellate Court held that based upon the actual price paid by the agent to the defendant, the "street value" of the cocaine in this case was $100 per gram.

People v. Roundtree, 135 Ill.App.3d 1075, 482 N.E.2d 693 (1st Dist. 1985) A police veteran of over 500 narcotics arrests, including 200 to 300 involving cocaine, was properly allowed to testify as to the "street value" of cocaine.

§13-10
Forfeiture and Civil Sanctions

United States Supreme Court

Dusenbery v. U.S., 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002) The due process clause bars the State from depriving a person of property without "due process of law," and requires that individuals whose property interests are at stake must receive notice of the proceedings and an opportunity to be heard. Forfeiture notice procedures satisfy due process where they are reasonably calculated, under all of the circumstances, to apprise interested parties of the pending action and provide an opportunity to present any objections. Notice by publication is constitutionally inadequate when the whereabouts of the interested parties are known. The notice procedures utilized here were reasonably calculated to advise defendant of the forfeiture action. The government used certified mail to deliver a forfeiture notice to the institution in which defendant was incarcerated. The court acknowledged that the agency which sought the forfeiture - the FBI - could have insured actual notice to the defendant by making arrangements with the Bureau of Prisons, a fellow federal agency. The fact that it failed to make such a special effort, however, does not invalidate procedures which were reasonably calculated to inform defendant of the pending action.

Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) Neither due process nor the "takings clause" of the Fifth Amendment is violated by a State forfeiture statute that fails to provide an "innocent owner" defense to forfeiture of an instrument used in a crime. The forfeiture of an innocent spouse's interest in an automobile that had been used by her spouse, without her knowledge, to commit a criminal act with a prostitute was upheld.

Austin v. U.S., 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) The government brought a forfeiture action to seize defendant's business (an auto body shop) and mobile home after he pleaded guilty to possessing a small quantity of cocaine. The defendant contended that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment ("[e]xcessive bail shall not be required, nor excessive fines imposed . . . .") because the seizure was disproportionate to the offense. The Supreme Court found that forfeitures of property are subject to the Excessive Fines Clause, and remanded the cause for the Court of Appeals to determine whether this forfeiture was excessive.

U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) In 1985, police executing a search warrant found marijuana and other contraband in the defendant's home. Defendant eventually pleaded guilty to charges resulting from the discovery and he was required to forfeit more than $3,000. Four years later, the government sought forfeiture of defendant's house and land under a federal statute (21 U.S.C. §881(a)(7)) providing for the seizure of real property used to commit or facilitate the commission of a federal drug offense. In an *ex parte* proceeding, a federal judge found probable cause and ordered seizure without an adversarial hearing or prior notice to defendant. The Supreme Court held that in the absence of exigent circumstances, the Fifth Amendment right to due process forbids forfeiture of real property without notice and a pre-seizure hearing. The Court concluded that the government's interest in proceeding *ex parte* is outweighed by a defendant's private interest in maintaining control of his home.

U.S. v. a Parcel of Land . . . Known as 92 Buena Vista Avenue . . ., 507 U.S. 111, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993) The government brought a forfeiture action against respondent's home, a gift from a former boyfriend, on the ground that it had been purchased with funds that were "traceable" to illegal drug transactions. The respondent claimed that she had no knowledge of the origin of the funds. The Supreme Court held that the respondent was entitled to assert the "innocent owner" defense of 21 U.S.C. §881(a)(6). The Court rejected the government's contention that the "innocent owner" defense is limited to persons who are "bona fide purchasers for value." Therefore, respondent was not precluded from raising the defense merely because she had received the property as a gift.

Illinois Supreme Court

People v. One 1998 GMC et al., 2011 IL 110236 The court rejected the argument that a prior version of the Illinois forfeiture statute (720 ILCS 5/36-1 *et. al.*) violated due process because it did not require a prompt probable cause hearing after a vehicle is seized. (Public Act 97-544 (eff. 1/1/12) amended the forfeiture act to require a timely, post-seizure probable cause hearing).

Generally, due process compels the government to provide notice and an opportunity to be heard before a person is deprived of property. This general rule is subject to an exception, however, where the property is mobile and could be moved, destroyed or concealed if advance warning of the confiscation is given. Furthermore, the claimants here did not argue that a pre-detention hearing was required, but only that they were entitled to a prompt probable cause hearing after the seizure.

The court rejected the argument that where a forfeiture statute provides a prompt, meaningful post-seizure hearing, due process requires that there also be a probable cause hearing. The court noted that a probable cause determination is made by the police at the scene and that in most cases, there will be a prompt probable cause determination in connection with the underlying criminal prosecution. Although that probable cause hearing does not necessarily concern the identity of the vehicle or whether it was used to commit a crime, it is unlikely that police will be mistaken about the identity of the vehicle or its connection to the crime, especially for the type of offenses involved here (aggravated DUI and driving with a revoked license).

The court also noted that the claimant has an early opportunity to contest any defects in the proceeding by bringing a motion to dismiss under §2-615 of the Code of Civil Procedure, and that the forfeiture proceeding continues only if the allegations survive the motion to dismiss.

Whether delay in a forfeiture hearing denies due process is determined by applying the **Barker v. Wingo** factors which control whether the right to a speedy trial has been violated. The court concluded that in this case, application of the **Barker** factors show that no due process violation occurred.

The first factor is the length of the delay. Here, the only reason there was no prompt hearing, as the statute required, was that the claimants requested several continuances and then challenged the constitutionality of the statute. Thus, the delay was entirely attributable to the claimants.

The second **Barker v. Wingo** factor concerns the reason for the delay. Because the claimants were responsible for the delay, this factor also favors the State.

The third factor is whether the claimant asserted the right to a judicial hearing. The court concluded that this factor also favored the State because the claimants failed to seek an early return of the vehicle by requesting discretionary remission of the forfeiture. Instead,

they filed several motions for continuance and then challenged the constitutionality of the statute.

The final factor is whether the claimants were prejudiced by the delay. Here, the claimants failed to allege any prejudice.

People ex rel. Devine v. $30,700 U.S. Currency, 199 Ill.2d 221, 766 N.E.2d 1082 (2002) Due process is satisfied where the notice provided by the State was reasonably calculated, under the circumstances, to apprise interested parties of the pendency of a forfeiture action and afford an opportunity to present any objections. Due process does not require that the prosecution make "heroic" efforts to ascertain the defendant's current address, so long as the actions satisfy the above test. Where the agency seeking forfeiture had no reason to know that the defendant had been incarcerated on an unrelated offense, and defendant failed to advise the agency of his change of address, certified mail sent to the defendant's last known address satisfied due process. Under the Drug Asset Forfeiture Procedure Act, notice of a forfeiture action must be sent by certified mail, return receipt requested (725 ILCS 150/1 *et seq*.). Notice is perfected when such a mailing is made, whether or not a return receipt is received.

People v. $1,124,905 U.S. Currency and One 1988 Chevrolet Astro Van (Mena, Appellant), 177 Ill.2d 314, 685 N.E.2d 1370 (1997) Under Illinois law, standing exists where there is "some injury to a legally cognizable interest." In addition, where the claimant files an answer contesting a forfeiture complainant, the State has the burden to challenge the claimant's lack of standing by showing that the claimant has not suffered an injury to a legally cognizable interest. A legally cognizable interest includes "any recognizable legal or equitable interest in the property seized." Furthermore, the State's complaint for forfeiture was insufficient to state a cause of action. Under the Illinois Controlled Substances Act, forfeiture is authorized where the State establishes "some nexus" between currency and drug activity. Thus, a forfeiture complainant must allege facts "providing reasonable grounds that there exists a nexus between the currency and illegal drug activity, supported by less than *prima facie* proof but more than mere suspicion." Here, the complainant alleged only that the currency "was furnished or intended to be furnished in exchange for a substance, or the proceeds thereof, in violation of the Controlled Substances Act." Although the State need not allege its evidence in the complainant, a claim that currency "is drug related must provide some supporting detail that would provide notice . . . of the nature of the drug connection." A "naked allegation that . . . seized currency is drug related" asserts only that a large amount of cash had been found, and does not provide notice of the alleged "nexus" between the currency and the alleged drug activity.

People v. One 1986 White Mazda Pickup Truck, 162 Ill.2d 67, 642 N.E.2d 455 (1994) Defendant was stopped for a traffic violation. During a search, police found a clear plastic straw in his coat pocket and a plastic bag containing cocaine in his underwear. After defendant pleaded guilty to possession of a controlled substance, the State moved to forfeit his pickup truck under Ch. 56½, ¶1505(a)(3) (720 ILCS 570/505), which authorizes forfeiture of "all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any matter to facilitate the transportation, sale, receipt, possession or concealment" of controlled substances. The court refused to order forfeiture on the ground that defendant's use of his vehicle was entirely incidental to the possession of controlled substances. The State argued that the vehicle facilitated defendant's possession by "providing a dimension of privacy not available . . . via other means of transportation." The court

disagreed, holding that the term "facilitate" should be interpreted as making the possession "easier or less difficult." Because defendant secreted the controlled substance on his person, use of the vehicle was "completely incidental" and did not facilitate the offense.

People ex rel. Waller v. 1989 Ford F350 Truck, 162 Ill.2d 78, 642 N.E.2d 460 (1994) The defendant was arrested for driving under the influence of alcohol. During the booking process, police discovered a piece of paper and a folded dollar bill containing traces of cocaine. After defendant was convicted for possession of cocaine, the State brought a forfeiture proceeding seeking defendant's truck and $55.99 that had been found in the same pocket as the paper and dollar bill. At the forfeiture hearing, a police detective testified that approximately five hours after the arrest he drove defendant to court for a bond hearing. On the way, the officer asked defendant why such an "old guy" had cocaine. Defendant replied that he had purchased the cocaine for one of his employees and not for his own use. The trial court found that the truck was forfeitable because it had "facilitated" defendant's transportation and possession of cocaine for his employee. The court also found that it could be presumed that the $55.99 in cash was also used to facilitate the possession of cocaine, and ordered it forfeited as well. The Supreme Court found that based upon defendant's statements that he was transporting the cocaine for an employee, the trial court could have properly concluded that defendant's truck was used to "facilitate" the transportation of cocaine. Therefore, the truck was forfeitable under Ch. 56½, ¶1505(a)(3) (720 ILCS 570/505), which authorizes the forfeiture of all conveyances used to "transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of controlled substances. See also, **People v. 1946 Buick**, 127 Ill.2d 374, 537 N.E.2d 748 (1989) (vehicle was used to "facilitate" drug offense where defendant poured substance on floorboard "in order to hide it from the view of the police"). Compare, **People ex rel. Kilquest v. 1978 Mazda**, 165 Ill.App.3d 540, 518 N.E.2d 1287 (5th Dist. 1988) (vehicle did not "facilitate" the offense where the substances were inside a shaving kit in a duffel bag on the rear seat). However, the Supreme Court concluded that the $55.99 in cash was not forfeitable merely because it was found in the same pocket as the cocaine. Although there is a statutory presumption (Ch. 56½, ¶1677(1); 725 ILCS 150/7) that currency found close to a controlled substance is subject to forfeiture, the presumption was rebutted here because the amount of money in question was no more than might be carried for ordinary expenses. The Court concluded that where only modest amounts of money are involved, the fact that cash is found close to drugs bears "less presumptive weight" than where large amounts of cash are found near controlled substances under circumstances suggesting a possible connection between the two.

Illinois Appellate Court

People v. One 2005 Acura RSX, 2017 IL App (4th) 160595 720 ILCS 5/36-1 provides that a vehicle used with the knowledge and consent of the owner to commit or attempt to commit an offense prohibited by §19-2 of the Criminal Code may be forfeited in a civil forfeiture proceeding. 720 ILCS 5/19-2(a) provides that a person commits the offense of possession of burglary tools by possessing any key, tool, instrument, device, or any explosive suitable for use in breaking into a building with intent to enter that place and commit therein a felony or theft.

Although civil forfeiture may serve a remedial purpose, such proceedings also serve in part to punish the owner of the property subject to forfeiture. Thus, civil forfeitures are subject to the excessive fines clause of the Eighth Amendment. A civil forfeiture violates the

excessive fines clause if it is grossly disproportional to the gravity of the offense for which the property is forfeited.

In determining whether a forfeiture violates the excessive fines clause, courts consider several factors including the inherent gravity of the offense compared to the harshness of the penalty, whether the property was an integral part of the commission of the crime, and whether the criminal activity involving the property was extensive in terms of time and/or spatial use.

The court concluded that forfeiture of a car worth $17,600 was excessive based on the offense of possession of burglary tools, a Class 4 felony punishable by a maximum fine of $25,000. Whether a fine is excessive does not depend solely on the maximum punishment available for the underlying offense compared to the claimant's equity interest in the forfeited property. Instead, courts must also consider that violent crimes are more serious than nonviolent crimes, completed crimes are more serious than attempted crimes, and intentional conduct is more culpable than negligent conduct.

In addition, because civil forfeiture may be instituted even where the defendant is not convicted of the predicate offense, the court must consider whether the claimant has been convicted of the criminal act underlying the forfeiture, has not been charged with any crime, or has been charged with and acquitted of criminal act underlying the forfeiture. The gravity of the claimant's conduct decreases in each situation.

Finally, the court must consider not only the monetary value of the property forfeited, but also the intangible value of the property.

Where the claimant engaged in nonviolent conduct by driving to several car washes to attempt to gain access to coin boxes, those efforts were mostly unsuccessful in that he obtained only two quarters, and he was not convicted of the offense which was the predicate for the forfeiture, the court found that the first factor (the inherent gravity of the offense compared to the harshness of the penalty) favored the claimant.

The second prong of the test focuses on whether the property was an integral part of the commission of the offense. The court concluded that the vehicle was not sufficiently related to the criminal activity to facilitate that activity in any significant way, as the claimant could just as easily have taken public transportation or walked to the car washes and could have concealed the burglary tools that were found in the car - two vending machine keys - on his person.

The third factor is whether the criminal activity involving the claimant's vehicle was extensive in terms of time and/or spatial use. The court concluded that using the car to drive to several car washes to attempt to obtain access to coin boxes over a period of about one week was not an extensive use of the vehicle and did not justify forfeiture.

The court also noted that the record included only limited information concerning defendant's alleged criminal activities, and because the State was the appellant it bore the burden of providing an adequate record for review.

People v. Pena, 2017 IL App (2d) 151203 Defendant was charged with money laundering. At the time of his arrest, police seized defendant's van, nearly $9,000 in cash, and two cell phones. When he was arrested, defendant gave his address as a residence in California.

Approximately two weeks later, the trial court reduced defendant's bond and he was released. As a condition of his pretrial release, defendant was ordered to remain in Illinois and to report to pretrial services. Defendant told pretrial services that he would be living with his sister in Glendale Heights, and he attended all scheduled court appearances and all appointments with pretrial services. He consistently listed the Glendale Heights address as his residence.

The State's Attorney sought administrative forfeiture of the van and cash, and sent notice of the forfeiture proceedings by certified mail to the California address. The return receipt was returned as "unclaimed unable to forward." The State also sent a declaration of forfeiture to the California address, and a tracking service showed that the notice was left at that address.

Illinois statutes provide that the State's Attorney may administratively forfeit property of less than $20,000 value by giving notice by certified mail to the address provided to the arresting agency at the time of the arrest. 720 ILCS 5/29B-1(i)(1)(A). The same section requires that the property owner notify the seizing agency of any change of address.

The Appellate Court held that defendant was denied due process by the State's attempted service to the address in California even though such notice may have complied with the letter of the statute. Although notice by certified mail is generally sufficient to satisfy constitutional concerns, the ultimate issue is whether the government acted reasonably under the circumstances. Where a condition of pretrial release was that defendant remain in Illinois, the State should have known that it was unreasonable to send the notice to the California address. The court noted that the record contained a copy of the pretrial release order including the requirement that defendant remain in Illinois, and that a call to pretrial services would have disclosed that defendant was living with his sister at an address in Illinois. Under these circumstances, due process required that the State do more than merely send a letter to the California address.

The forfeiture order was vacated and the cause remanded for further proceedings with instructions that defendant was entitled to the statutorily required period in which to object to the forfeiture request.

People v. $280,020 in U.S.C., 2013 IL App (1st) 111820 In forfeiture proceedings, the burden is on the State to prove that the claimant suffered no injury to any legally cognizable interest so as to lack standing to contest the forfeiture. Legally cognizable interests include any kind of legal or equitable interest, including possession without ownership.

The claimant had standing to contest the forfeiture where the cash was in his possession when it was seized by the police even though he denied ownership.

People v. Durbin, 210 Ill.App.3d 825, 569 N.E.2d 548 (5th Dist. 1991) The defendant pleaded guilty to unlawful delivery of a controlled substance, and was ordered to forfeit $60 found in his possession at the time of the offense. The Court reversed the forfeiture order; under Ch. 56½, ¶712, forfeiture is not a sentencing alternative, but requires a separate forfeiture proceeding. Because the forfeiture order was void, it was subject to attack even though no objection had been raised in the lower court.

§13-11
Police Searches, Surveillance, and Controlled Buys

Illinois Supreme Court

People v. Manzo, 2018 IL 122761 Before his trial for gun and drug possession, defendant moved to quash the search warrant and suppress the evidence found in his home as a result of that warrant. Defendant alleged the police lacked probable cause to search his residence, which he shared with his girlfriend Leticia. The warrant targeted Casillas, Leticia's cousin. But it sought to search defendant and Leticia's home, because: (1) on the day of the first undercover controlled buy from Casillas, officers saw Casillas driving Leticia's car, which was

registered to defendant's home; and (2) 19 days later, before another controlled buy, Casillas left defendant's home and walked to the nearby supermarket where he sold the drugs. Casillas also made a third sale near defendant's home. The trial and appellate courts upheld the search.

The Illinois Supreme Court reversed in a 4-3 decision. The majority held that the facts known to the police and recited in the warrant failed to establish a sufficient nexus between Casillas' criminal activities and the defendant's home. The link between Casillas and Leticia did not create an inference they engaged in drug dealing together. The fact that Leticia allowed Casillas to drive her car to a drug deal does not establish Leticia knew of Casillas' illegal activities or that this was a regular occurrence. "To hold otherwise could expose virtually any innocent third party to a search of the home." As for the sale occurring after Casillas left the residence, more information is required for probable cause: whether he lived there, how often he visited, how long he stayed before leaving, where he went before, etc. Notably, the warrant did not include information such as Casillas' criminal history, or the officer's experience with the manner in which drug dealers use nearby residences as a "stash house," as was the case in several authorities cited by the State.

Finally, the Court enforced the exclusionary rule because the good faith exception does not apply when the affidavit so lacks indicia of probable cause as to render official belief in its existence unreasonable. Here, the warrant affidavit could be characterized as "bare bones" because it failed to establish the required minimal nexus between defendant's home and the items sought in the warrant. Nothing directly connected Casillas' drug dealing to defendant's home itself, nor even raised an inference of such a connection.

The dissent disagreed with both conclusions, finding that while Casillas may have simply stopped at defendant's home while carrying the drugs on his person, "it is far more likely" that he used defendant's home to keep a "ready supply" because he was already at the home when contacted by the undercover purchaser. The dissent faulted the majority for isolating each fact rather than considering them in total. Finally, the dissent strongly disagreed that the affidavit could be considered "bare bones" in light of the two concrete connections between Casillas and defendant's residence.

Illinois Appellate Court

People v. Matthews, 2017 IL App (4th) 150911 Defendant was convicted of unlawful delivery of a controlled substance based upon a controlled buy arranged by a confidential source.

Under Supreme Court Rule 412(j)(ii), disclosure of the identity of a confidential source is not required if the lack of disclosure does not infringe on defendant's constitutional rights. The determination of whether disclosure is required is made on a case-by-case basis. Here, there was no showing that the source's identity was necessary to prepare a defense where counsel did not even request disclosure pretrial. Counsel's failure was not excused by the assertion that the defense "didn't care about the confidential informant pretrial" and that the source's identity only became relevant when defendant's right to confront came into play. Under that logic, there would be no need for the State to even tender discovery prior to trial.

People v. White, 2017 IL App (1st) 142358 Defendant was convicted in a bench trial of delivery of a controlled substance. The officer who conducted the controlled buy testified that he did not remember seeing scars on the seller's face or tattoos on his body. Similarly, the surveillance officer testified that he had a clear and unobstructed view of the seller, who was wearing a white tank top, and that he did not observe any tattoos on the seller's body.

The defense sought to demonstrate tattoos on defendant's arms to the trial judge. The officer testified that the seller conducted the transaction with his right arm, and the judge allowed the defendant to show the top of his right arm but only with the palm down. In denying counsel's request that defendant be allowed to show the tattoos on his right arm with his palm up, the judge stated that defense counsel had not asked the officer whether defendant's palm was up or down. The record showed that defendant had a tattoo from elbow to wrist on his forearm, but the judge stated that the tattoo could not be seen when defendant had his palm down.

The trial judge also found that it was irrelevant that defendant had a tattoo on his left arm because the record showed that the seller performed the transaction with his right arm. In addition, the trial court overruled defense counsel's objection that the judge was observing defendant's tattoos while on the bench and from above, instead of standing next to defendant as the officer had done when conducting the buy.The officer who conducted the buy was recalled and testified that he did not remember how defendant's hand was positioned during the transaction. However, the officer demonstrated how defendant reached toward him during the buy, and the trial court stated that the officer's arm was extended with the palm down.

The Appellate Court found that defendant was denied a fair opportunity to present his defense that he had been misidentified because the trial court required defendant to show his forearm with the palm down, refused to allow defendant to show the tattoo on his left arm, refused to permit the officer who conducted the buy to identify defendant's tattoos in court, and refused to allow defendant to demonstrate that his tattoos would have been visible from the officer's position at the time of the offense.

A criminal defendant is constitutionally guaranteed a meaningful opportunity to present a complete defense. Here, defendant was denied such an opportunity because the trial court substituted its own observations of defendant's tattoos for a demonstration whether the officer could have seen the tattoos during the offense.

The trial court also erred by refusing to allow defense counsel to introduce evidence regarding the tattoos on defendant's left arm. The court deemed such evidence irrelevant, because the seller conducted the transaction with his right arm. However, the offense allegedly occurred about 5:30 p.m. on a summer day, and the officer who made the buy said that the seller emerged from a garage in an alley and walked toward him. The officer was therefore able to observe the seller's left arm, and he did not testify otherwise. The trial court's ruling denied defendant a fair opportunity to challenge the officers' identification by showing that he had a tattoo on his left arm which extended from elbow to wrist.

People v. Teper, 2016 IL App (2d) 160063 720 ILCS 570/414(c) provides that a person "who is experiencing an overdose shall not be charged or prosecuted for . . . possession of [specified amounts of] a controlled . . . substance . . . if evidence for the . . . charge was acquired as a result of the person seeking or obtaining emergency medical assistance." However, 720 ILCS 570/414(e) provides that such limited immunity shall not be afforded where law enforcement "has reasonable suspicion or probable cause to detain, arrest, or search the person . . . for criminal activity and the reasonable suspicion or probable cause is based on information obtained prior to or independent of the individual . . . taking action to seek or obtain emergency medical assistance and not obtained as a direct result of the action of seeking or obtaining emergency medical assistance."

The court concluded that where police found defendant unconscious after a citizen call reported a driver slumped over the steering wheel of her car, and police suspected a drug overdose and administered Narcan, defendant qualified as a person who was "obtaining"

emergency medical treatment under §414(c). The court rejected the State's argument that to "obtain" emergency medical assistance, a person must take some affirmative action.

However, the court pointed out that under §414(c), immunity applies only if the evidence was procured by the person obtaining emergency medical assistance. Here, the officers observed two baggies of a brown rock-like substance which they believed to be heroin and several hypodermic syringes in the bottom of a can which contained cotton. The officers did not discover the evidence as the result of defendant obtaining help. Instead, it was the presence of the suspected drugs and paraphernalia which led officers to believe that defendant was suffering an overdose. Under these circumstances, the limited immunity authorized by §414(c) did not apply to the charge of unlawful possession of a controlled substance.

In the alternative, §414(e) would have barred immunity because the officers saw the illegal drugs in plain view while they were investigating a car that was stopped in traffic. At that point, they had probable cause to seize the contraband and arrest the occupants of the car. Because the officers had probable cause independent of the emergency medical assistance rendered to defendant, limited immunity did not apply.

Defendant's conviction was affirmed.

People v. Stapinski, 2015 IL 118278 After he was arrested for unlawful possession of ketamine with intent to deliver, defendant entered an agreement with police to assist in apprehending the persons to whom he was supposed to deliver the ketamine. Approximately a year after defendant provided such assistance, and the intended recipients had been prosecuted, defendant was charged with unlawful possession of ketamine with intent to deliver.

At a hearing on his motion to dismiss the charge, defendant, his mother, and his attorney testified that defendant and the police had agreed that the ketamine charge against defendant would be dropped in return for his cooperation in apprehending the intended recipients of the substance. Furthermore, if defendant assisted in four additional cases, an old drug charge would also "go away." A police officer testified, however, that defendant was required to assist in the additional four cases in order to obtain dismissal of the ketamine charge.

The trial court dismissed the charge after concluding that the agreement was to dismiss the ketamine charge in return for assisting the police in apprehending the two intended recipients. The trial judge found that defendant had fulfilled his obligations under the agreement, and that due process was violated because defendant incriminated himself based on a bargain which the State refused to honor.

The Appellate Court reversed, finding that the only prejudice suffered by defendant was that he made incriminating statements. The Appellate Court found that defendant would be protected if the incriminating statements were suppressed.

The Supreme Court affirmed the trial court, finding that there was a due process violation.

Cooperation agreements benefit law enforcement by permitting police to apprehend large-scale drug dealers. Such agreements are to be construed under general contract principles. Because of the unequal bargaining positions of police officers and suspects, governmental agencies are obliged to deal fairly with persons who, in return for offers of immunity, agree to provide information which may expose them to greater criminal liability.

Due process is implicated where the State's actions toward its citizens are oppressive, arbitrary, or unreasonable. The trial court has inherent discretion to dismiss a charge where the State has violated due process.

The court concluded that where the trial judge found that the parties agreed that defendant would have his charge dismissed in return for helping officers apprehend the recipients of the ketamine, and defendant fulfilled the agreement, the trial court did not abuse its discretion by dismissing the charge.

The court rejected the State's argument that in the absence of the prosecutor's approval, there was no valid agreement that defendant's charge would be dropped. Although police officers cannot bind the State's Attorney, the court found that the issue was whether due process concerns require that a person who fulfills his obligation under an agreement which was negotiated with police is entitled to be treated with fairness and justice. "Whether or not the cooperation agreement was 'valid' in the sense that it was approved by the State's Attorney, is not important. An unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences."

The trial court's dismissal order was affirmed.

People v. Moore, 2012 IL App (4th) 100939 Defendant's 2-1401 petition failed to carry his burden to show by a preponderance of the evidence that his convictions for criminal drug conspiracy and controlled substance offenses were obtained by the State's knowing use of perjury. A police officer testified at defendant's trial that the money used to make a controlled drug buy was found on defendant's person at the time of the arrest, but testified at the co-defendant's subsequent juvenile hearing that the buy money was in the possession of the co-defendant at the time of the arrest. However, at the second hearing the officer stated that he had made a mistake in his original report and that the money had in fact been found on the co-defendant.

A person commits perjury when, under oath or affirmation in a matter where an oath or affirmation is required, he makes a false statement which is material to the issue and which he does not believe to be true. (See 720 ILCS 5/32-2(a)). Mere inconsistencies in testimony do not equate to perjury. Furthermore, due process is violated only if the State knowingly used perjured testimony to obtain a conviction. Here, there was no evidence that the State's use of the incorrect testimony was knowing. Finally, the new testimony would not satisfy the standard to obtain a new trial in § 2-1401 proceedings. In view of the overwhelming evidence of guilt, the fact that buy money given to defendant had been found on the person of the codefendant would not have changed the result of the trial, and would in fact have solidified the evidence of a conspiracy.

People v. Bell, 373 Ill.App.3d 811, 869 N.E.2d 807 (1st Dist. 2007) The trial court did not err by refusing to require the State to disclose the "secret surveillance location" from which an officer allegedly viewed criminal activity.

People v. Knight, 323 Ill.App.3d 1117, 753 N.E.2d 408 (1st Dist. 2001) Under **People v. Criss**, 294 Ill.App.3d 276, 689 N.E.2d 645 (4th Dist. 1998), the State need not disclose, *at a suppression hearing*, the exact location from which surveillance occurred, so long as the defendant's right to confrontation is not violated. Without passing on the validity of **Criss**, the court concluded that where the issue arises *at trial*, the State should be compelled to disclose the exact surveillance location if that information is "material" to the issue of guilt. Thus, where the State claims a surveillance privilege at trial, the court should conduct an *in camera* hearing outside the presence of defendant and defense counsel. The State should be required to reveal the exact surveillance location and make a preliminary showing that "disclosure of the surveillance location would harm the public interest." The trial court must then weigh the defendant's need for the information against the public's interest in non-

disclosure, considering such factors as the nature of the crime charged, the possible defenses, and the potential significance of the information for which the privilege is claimed. When the State's case rests solely on the officer's testimony, disclosure "must almost always be ordered." In addition, where an officer's testimony is uncorroborated, application of the surveillance privilege "will severely hamper the defendant's ability to cross-examine the officer on the key factual issues." Thus, the only instances in which nondisclosure would "positively not be necessary is where 'no question is raised about a surveillance officer's ability to observe or a contemporaneous videotape provides the relevant evidence.

People v. Pendleton, 307 Ill.App.3d 966, 719 N.E.2d 320 (3d Dist. 1999) To commit the offense of calculated criminal drug conspiracy, an individual must violate one of several drug provisions as "part of a conspiracy undertaken or carried on with two or more other persons" and either receive "anything of value greater than $500" or "organize, direct or finance" the conspiracy. (720 ILCS 570/405). The Appellate Court affirmed **People v. Biers**, 41 Ill.App.3d 576, 353 N.E.2d 389 (3d Dist. 1976), which held that because at least three people must participate in a calculated criminal drug conspiracy, a defendant convicted under the theory that he received consideration must have *personally* received more than $500. In other words, because the offense "requires at least three people to commit," a defendant cannot be held accountable for another conspirator's receipt of the proceeds. Here, there was no basis to believe that defendant actually received $500. First, defendant did not personally accept the money from the undercover officer. Second, because three people had to split $1,000, there was a reasonable doubt that defendant's share was greater than $500. The court contrasted this case with those in which a defendant actually possessed more than $500 for at least a brief period of time or the proceeds of a conspiracy totaled several thousand dollars, creating an inference that a single conspirator's share would exceed $500.

People v. Damian, 299 Ill.App.3d 489, 701 N.E.2d 171 (1st Dist. 1998) Probable cause to issue a warrant was lacking where a confidential informant had no proven record of reliability and was not brought before the judge who issued the warrant, police did not personally witness an alleged controlled buy to the informant from the defendant, and the informant had failed to keep a scheduled appointment with police six weeks earlier. Although an informant's lack of reliability can be overcome by the strength of other evidence, there was no such evidence where no independent police investigation corroborated the claim that cocaine would be found at defendant's premises.

People v. Perez, 209 Ill.App.3d 457, 568 N.E.2d 250 (1st Dist. 1991) The defendant participated in three sales of cocaine to an undercover agent. All of the sales were arranged by an informant, who was also present at each sale. Defendant testified he was entrapped and that he participated in the sales only after the informant threatened to harm his family. Defendant sought discovery on the informant but the prosecutor, after claiming that the informant would not be called as a witness, used the informant as a witness in rebuttal. The Court held that defendant was entitled to the information sought in discovery because the informant played an active role in the criminal acts.

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Conspiracy

Illinois Supreme Court

People v. Hickman, 163 Ill.2d 250, 644 N.E.2d 1147 (1994) 720 ILCS 570/405.1(c), which provides that a person convicted of criminal drug conspiracy "may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy," is not unconstitutionally vague because it fails to provide a minimum sentence. Due process requires only that citizens have fair notice of sentencing provisions, and not that every crime necessarily include a minimum sentence.

People v. Harmison, 108 Ill.2d 197, 483 N.E.2d 508 (1985) The evidence was insufficient to support defendant's conviction for calculated criminal drug conspiracy (Ch. 56½, ¶1405(a)). Specifically, the evidence failed to prove that defendant "agreed" with two other persons to commit the offense. The defendant and a man named Dubois agreed to deliver cocaine to a third party. Dubois obtained the cocaine from a man named Lowe, and gave the cocaine to defendant to sell to the third party. The Court found that "the evidence did not prove that Lowe agreed with defendant or Dubois to the commission of the offense." Section 1405 requires that defendant agree with "two or more other persons." See also, **People v. LeShoure**, 139 Ill.App.3d 356, 487 N.E.2d 681 (4th Dist. 1985) (conviction reversed); **People v. Unes**, 143 Ill.App.3d 716, 493 N.E.2d 681 (3d Dist. 1986) (conviction affirmed).

Illinois Appellate Court

People v. Moore, 2012 IL App (4th) 100939 Defendant's 2-1401 petition failed to carry his burden to show by a preponderance of the evidence that his convictions for criminal drug conspiracy and controlled substance offenses were obtained by the State's knowing use of perjury. A police officer testified at defendant's trial that the money used to make a controlled drug buy was found on defendant's person at the time of the arrest, but testified at the co-defendant's subsequent juvenile hearing that the buy money was in the possession of the co-defendant at the time of the arrest. However, at the second hearing the officer stated that he had made a mistake in his original report and that the money had in fact been found on the co-defendant.

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People v. Gonzales, 314 Ill.App.3d 993, 734 N.E.2d 77 (2d Dist. 2000) Although criminal drug conspiracy is itself an unclassified offense, it carries the same sentence as the offense that was the object of the conspiracy. Where the object of the conspiracy was a Class X felony, defendant was guilty of a Class X offense for purposes of determining credit for pretrial detention.

People v. Caballero, 237 Ill.App.3d 797, 604 N.E.2d 1028 (3d Dist. 1992) The Court reversed a conviction for calculated criminal drug conspiracy because the evidence did not establish that three people agreed to commit certain drug violations, as required by the statute. Under **People v. Harmison,** 108 Ill.2d 197, 483 N.E.2d 508 (1985), no offense occurs

when one conspirator merely feigns agreement and here, the third person was a police informant who never actually agreed to the conspiracy.

People v. Urban, 196 Ill.App.3d 310, 553 N.E.2d 740 (3d Dist. 1990) A defendant may not be charged with conspiracy to deliver cannabis based upon his act of purchasing cannabis.

People v. Biers, 41 Ill.App.3d 576, 353 N.E.2d 389 (3d Dist. 1976) In a prosecution for calculated criminal drug conspiracy, Ch. 56½, ¶1405, it was error to instruct the jury that it was only necessary that one of the members of the underlying conspiracy obtained more than $500 therefrom. To support a conviction for this offense, it is essential the State prove that defendant either obtained $500 from the conspiracy or organized, financed or directed the conspiracy.

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